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ABSTRACT

The deterioration of printed materials is a problem which is plaguing libraries worldwide. Preservation of these millions of volumes is a daunting task--many of the materials are so brittle that the lightest touch may damage them irrevocably. This paper explores the issues of maintaining preservation efficiency without infringing upon copyright laws. Six major sections explore these issues: (1) Background (the cause and magnitude of deterioration and the creation of the Commission of Preservation and Access in 1984); (2) The U.S. Copyright Scheme (the extent of public domain, copyright status of a work, the rights of and limitations on copyright owners); (3) Reprise--Applying the Act to the Brittle Books Preservation Program; (4) What Have Other Organizations Done about Copyright? (the Library of Congress, Research Libraries Group, National Library of Medicine, and University Microfilms); (5) A Review of Several Possible Solutions (negotiated agreements with publishers, reliance on Fair Use, amendment of the Copyright Act, collective licensing, internal royalty payment fund, creation of quasi-governmental corporation); and (6) Legislative or Other Follow-Up Action (decisions to be made, discussion and agreements among library groups, discussion with publishing community, and discussion with congressional staff and the Copyright Office. A list of the publishing organizations participating in the Copyright Clearance Center's Annual Authorizations Service as of January 1990 is appended. (214 footnotes) (MAB)

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COPYRIGHT AND PRESERVATION:

A Serious Problem in Need of a Thoughtful Solution

by

ROBERT L. OAKLEY

September 1990

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Copyright and Preservation:
A Serious Problem in Need of a Thoughtful Solution[1]

by Robert L. Oakley[2]

"The Copyright Office is not prepared to support a broad new privilege allowing libraries largely unrestrained preservation copying rights with respect to published works, and permitting storage in machine-readable, computer-accessed systems. . . . The Office . . . recognizes that libraries should be able to employ new preservation techniques, provided adequate copyright controls are legislated, both with respect to the preservation copying and information supplying functions of libraries. We recommend a thorough review of these issues by the library, user, author, and publishing communities with a view to developing a common legislative position."[3]

I. BACKGROUND

Virtually every medium of expression is threatened today by the natural forces of deterioration. The destruction of works recorded on paper, film, photographic prints, paint on canvas, phonorecords, video and audio tapes, and even optical and digital disks is proceeding at a pace that threatens to destroy most of the artistic and intellectual works of the past century and a half. The movie industry has been particularly concerned about the preservation of the film records of the twentieth century, and many of the newer media such as optical disk appear to have a relatively short life.[4] But film can be converted to videotape or optical disk, and digital data can be reproduced with no degradation, provided the copy is made before the original deteriorates too far. Art historians are justifiably concerned about the loss of original artwork as well as the threatened deterioration of photoarchives, and for them, the solutions are less obvious because nothing can re-create the original. Overall, however, there is general agreement that the problem of brittle books is a crisis even more urgent than that in the arts.[5]

The deterioration of printed materials, books and serials printed on paper since the middle of the 19th century, is by far the most vexing of the preservation problems. It is a problem made more complicated by the fact that the deterioration has already progressed to the point where the materials are no longer simply threatened, many have already been lost, and others crumble at the slightest touch. Moreover, the sheer magnitude of the problem is daunting: hundreds of millions of volumes have been printed, and most of those are in various states of disrepair. To complicate things further, the materials in question are scattered all over the world. Library collections overlap, but even small libraries contain unique items. As a result, there is an urgent need for a major cooperative effort to preserve everything of value while avoiding unnecessary duplication of effort.

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[1] This paper was prepared at the request of the Commission on Preservation and Access which is considering large scale solutions to the problem of deteriorating collections in the nation's research libraries. It is intended to be a review of the relevant issues and law; it is not intended to substitute for formal legal advice.

[2] Copyright 1990 by Robert L. Oakley. Robert Oakley is the Director of the Law Library and Professor of Law at the Georgetown University Law Center in Washington, D.C.

[3] *Library Reproductions of Copyrighted Works (17 U.S.C. 108)*, Report of the Register of Copyrights 340 (January 1983).

[4] Paper, properly produced, has a life expectancy far exceeding that of the newer media. Acid free paper has been estimated to have a life expectancy of 300-400 years. By contrast, the newer digital optical disks have an estimated life of only 15 to 20 years.

[5] "Scholarly Resources in Art History: Issues in Preservation, Report of the Seminar", Spring Hill, Wayzata, MN, Sept. 29-Oct. 1, 1988. Commission on Preservation and Access, 1989.

A. The Cause of the Problem

Virtually everything written or printed on paper since the middle of the 19th century is self-destructing at a rate that will soon make it unusable. Interestingly, older papers are actually more permanent and in better condition than those produced in the last hundred years. The cause of the problem lies in modern methods of paper manufacture.

Among the expanding population of the eighteenth and nineteenth centuries, advances in medicine, industrial invention, and new patterns of social interaction led to educational reform and increased literacy.[6] An increasing demand for reading material coincided with two innovations—mechanical printing and mechanized papermaking[7]—which accelerated the growth of mass communications through new forms of cheap publication like books, tracts, newspapers, and encyclopedias.[8] Mechanization, aided by the increasing use of steam power from burning coal, made it possible for paper manufacturers and printers to meet the rising demands of the population.

The increased production of paper, however, placed new demands on the suppliers of raw materials. For centuries, the source of the essential chemical constituent of paper, cellulose, was primarily linen and cotton rags. Unfortunately, the methods of rag collection remained unchanged during the age of expansion. The itinerant ragman and wholesale rag merchant could not come close to meeting the tremendous and unexpected demand for the raw material of paper.[9] Further aggravating the supply problem was the reduction of a major source of rags—the waste product of the textile industry. The mechanization of that industry rendered it more efficient, and thereby reduced dramatically the amount of waste. By the mid-nineteenth century, the pressure from market forces stimulated the search for a new source of cellulose—a source eventually found in wood pulp.

Following decades of experiments with alternatives to rags by paper manufacturers, the German F.G. Keller patented an invention for the use of ground wood for paper pulp in 1840.[10] But this revolution in papermaking brought with it a new problem, since the wood pulp fibers that form the paper mesh were substantially shorter and weaker than the fibers in rags. In addition, certain chemical compounds[11] used in the manufacturing process remain in unpurified wood pulp and then degrade to form acids and peroxides that promote the aging of the paper. Newspapers and less expensive books have been printed on paper made of unpurified ground wood pulp, thereby rendering them susceptible to especially rapid deterioration. Yet newsprint continues to be popular because of its low price and high absorbency, which make it an economical and efficient medium for high speed presses. Many important documents are printed on such paper, including daily newspapers, the Federal Register, the Code of Federal Regulations, and the daily Congressional record.

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[6] Coleman, D.C., *The British Paper Industry, 1495-1860*, (Oxford Univ. Pr., 1958) 208.

[7] The mechanization of the paper industry came in 1799 with the invention of the first, albeit crude, papermaking machine by the Frenchman Nicholas-Louis Robert. News of the machine spread quickly to England, the one country which at that time possessed the capital, the enterprise, and the skill necessary to develop industrial mechanization. The Robert invention was later perfected and developed under the auspices of the London firm of Fourdrinier, the leading British wholesale stationer of the time, which obtained all rights to the patent. The Fourdrinier machine represented a straightforward mechanization of what formerly had been done by hand. Still, mechanization of papermaking did not have a great impact before the 1830's, at which time the output of hand-made paper began to fall off sharply. It was not until wood-pulp was incorporated into the process that the industry was able to meet the needs of modern consumption. *Id.*

[8] *Id.*

[9] *Id.* at 338.

[10] *Id.* 343.

[11] Lignins and hemicelluloses. "Paper and its Preservation", Library of Congress, National Preservation Program Publications, Preservation Leaflet #2, October 1983, 1.

The invention of wood pulp paper was the first step in creating short-lived paper. But an even more significant problem was the introduction of a new size in paper manufacture. "Size" is a chemical applied to the cellulose fiber of pulp to help prevent ink from spreading.[12] A new size called alum-rosin became popular by the mid-nineteenth century.[13] It was economical, easy to use, and produced an excellent product. But it also had a serious effect on the permanence of the paper.

At the molecular level, cellulose fibers resemble a chain. This fiber chain gives paper its strength. But alum-rosin sizing reacts with available moisture to produce sulfuric acid, which in turn reacts with the chemical groups in the chain and eventually causes breaks in the structure.[14] Thus the fibers are weakened and the paper becomes brittle. This process of deterioration is accelerated by the presence of high temperatures, humidity and atmospheric pollutants.[15]

These modern methods of paper-making bring with them the seeds of the eventual self-destruction of the paper produced. Although techniques have been developed to stop further deterioration of the paper, there is no known way to repair the damage that has already occurred to make brittle paper flexible again. Such restoration is unlikely because it would involve repairing the damage—restoring the cellulose chains—that occurred at the molecular level.[16]

Because for now we can only arrest the damage, not repair the damage already done, the eventual loss of the documents contained on paper appears to be inevitable. It is therefore imperative that some means be found to use modern technology to preserve the material by copying it to alternate formats.

B. The Magnitude of the Problem

The problem of paper deterioration affects virtually everything printed from the middle of the nineteenth century until today. To understand more precisely how much material is currently at risk, and how much should be converted to other formats, Robert Hayes did a study in 1987 to estimate the magnitude, costs, and benefits of preserving brittle books in the research libraries of the United States.[17]

The Hayes study concludes that there are approximately 305 million volumes in the nation's research libraries, and that approximately 25 percent of them, or 76 million volumes, are currently at risk. Making some further assumptions about the extent of further deterioration over the next 20 years (38 million more volumes) and the extent of overlap among collections (10 libraries hold any given title), the author concludes that there are 11.4 million unique items to be preserved. Further assuming that some have already been filmed and only one third of the rest will be saved, Hayes concludes that the conversion effort will total approximately 3.3 million volumes.

Turning to the cost, Hayes estimates that it will take approximately $358 million, or about $108 per volume, simply to make the initial conversion of the material. He believes that those costs can be shared by the institutions themselves, the Federal and state governments, foundations, and the commercial sector.

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[12] Coleman, *supra* nt. 6 at 32.

[13] *Id.* For centuries, paper makers used size made from animal gelatin. By the close of the seventeenth century, however, "alum", or aluminum sulfate, was added to sizes. From this practice grew the use of alum-rosin.

[14] U.S. Congress. "Hearings of the Senate Rules and Administration Committee on the Construction and Maintenance of the Proposed Library of Congress Mass Book Deacidification Facility to be located at Fort Detrick, MD", April 11, 1984.

[15] Scientific tests show that with every increase of 10 degrees Fahrenheit in temperature (5.5 degrees Celsius) the useful life of paper is approximately halved. Atmospheric pollutants, common in urban areas, damage paper becase of their tendency to combine with atmospheric moisture to form acids. "Newsprint and Its Preservation," Library of Congress, National Preservation Program Publication, Preservation Leaflet #5, November 1981, 1.

[16] Interestingly, the author has recently learned that research is currently under way at the University of Illinois to restore paper, not by reassembling the cellulose chains, but by coating it and rebonding the fibers on the surface.

[17] Robert M. Hayes, "The Magnitude, Costs, and Benefits of the Preservation of Brittle Books", Report #0 on the Preservation Project, November 30, 1987.

Using similar methodology, the Commission on Preservation and Access has determined that the number of volumes to be preserved ranges from 3.3 million to 10 million. They believe that the lower number is "an estimate of the *minimum* number of volumes to be saved on microfilm if the core of important holdings is not to be lost. Were funding available, it would be important to save as many of the entire 10 million as possible." Their estimate of the cost is somewhat lower than that of the Hayes study, since they concluded that the project can be undertaken for $270 million including the development of a central system for retrieval and distribution of needed items. For 3.3 million volumes, the unit cost would be approximately $82 per volume.[18]

Both of these studies are built around a large number of assumptions. However, they do make clear that the problem is a large one, with an immediate need to save (*i.e.*, copy) at least 3.3 million volumes and possibly as many as 10 million volumes. The cost for this effort is likely to be at least $250 million and could reach as much as $1 billion.

C. The Commission on Preservation and Access

In response to such seemingly insurmountable problems, the Council on Library Resources created a Committee on Preservation and Access[19] in 1984. Composed of library directors, university officers, and scholars, the Committee was charged "to develop a realistic plan to preserve large quantities of library materials and to find ways to encourage action."[20] The Committee conducted a number of studies and met several times before issuing its final report in 1986.

The final report of the Committee urged purposeful, resolute, and efficient movement toward a solution. The brittle books problem, it said, "will not be solved by accident. The scale is too great, the cost too large, and the setting too complex." In order to create a coordinating structure for the effort, the Committee recommended the creation of a Commission on Preservation and Access and a National Advisory Council on Preservation. The Commission, with paid staff, was to develop plans (including funding plans) and procedures to establish and carry out a collaborative brittle book preservation program. It was also expected to encourage research into preservation issues and to promote access to preserved materials.[21]

The Commission held its first meeting in April of 1986, and developed an ambitious plan to achieve its objectives. Enlisting the support of many of the nation's largest research libraries and the Library of Congress (L.C.), the Commission proposed a 20- year program to microfilm the contents of over 3 million brittle volumes. In 1989, Congress authorized increased funding to the National Endowment for the Humanities to significantly expand the activities of its Office of Preservation. The multi-year preservation plan that NEH has submitted to Congress includes as its major component enhanced support for projects to microfilm brittle books and serials. The goal of the NEH initiative is to raise the rate of preservation microfilming over the next five years to a level that will enable the country to preserve the intellectual content of three million volumes by 2009.

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[18] See generally, "Information about the Brittle Books Program", Commission on Preservation and Access, June 1988.

[19] Actually, the Committee began as the Preservation Committee, but quickly decided that "access is the corollary of preservation. . . . The cost of preserving a significant portion of those materials now unusable in research libraries will be justified only if access is enhanced . . . This implies effective bibliographic information about what has been preserved and a responsive system for securing copies of the texts themselves." Interim Report of the Committee on Preservation and Access in *Brittle Books: Reports of the Committee on Preservation and Access* at Appendix 1, p. 22 (1986). This expansion of the mission of the original committee has significant copyright implications.

[20] *Id.* at 21.

[21] "Report of the Committee on Preservation and Access," in *Brittle Books*, *supra* nt. 19, at 7, 12.

The Commission and the libraries with which it is working will not be content to stop with the simple conversion of the material to another format. They are exploring the development of a central distribution facility to retrieve items as needed, and to reproduce them in film, fiche, or paper. Eventually, they may convert the documents again, to digital format for electronic storage and distribution.

> The ultimate vision is the existence of a collective knowledge base, in digitized format, from which institutions and individuals can obtain information in a variety of formats to serve the scholarly objectives and programs. . . . This initial system would exist with the expectation that storage, access, and service enhancements would evolve with the increasing use of technology by scholars, and with the expanded availability of network capabilities to the research community.[22]

The ultimate goal is to create a large electronic "library" which scholars and libraries worldwide could use, not only to read documents, but also to produce subsequent copies if desired. The scholar could locate an article in a serial, and direct the article to his or her high speed printer or to a disk. Similarly, the college library that wanted to replace a deteriorated run of serials in its collection could have them reproduced in film or could have them printed on acid-free paper and bound to replace the ones falling apart on the shelf. It is even possible that this electronic library would, in time, replace existing research libraries as we know them because unless those libraries replace their collections as they deteriorate, they will soon consist only of current materials (materials printed on acid free paper from the 1980's on) and rare older materials (printed before the 1820's or 30's). There will be a substantial gap of materials printed on paper for the 150 years or so in between.

Carrying out such a mission will plainly involve making multiple copies of each work. The first will be made when the works are converted to film. A master copy will be stored and another copy will be used as the working copy. Subsequent copies to be sold or converted to electronic format will be the third copy. If the works in electronic form are then made available to users or libraries by display, downloading, or printing on paper, yet another "copy" has been made. Some of these "copies" may not result in tangible paper or film products.

From the earliest days, the Commission has been concerned about the copyright implications of the brittle books preservation program. Although much of the material is in the public domain, some is not. Moreover, it is not always easy to determine which is which. Without protection, libraries participating in the program may run the risk that copyright owners may wish to assert a claim for some or all of the copying.

The library and archives community is, therefore, anxious to move forward with the preservation program with reasonable efficiency while minimizing the potential exposure to copyright claims and litigation. To do so, the Commission and its constitutents need to know on which works they can move forward, where there are likely to be problems with copyright owners, and how best to resolve those problems and minimize the risk. If a legislative solution is required, they want to begin discussions with the Congress. The balance of this paper will explore these issues, define their parameters, and, hopefully, begin to move the discussion toward a resolution.

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[22] "Organization, Goals, and Activities of the Commission" p. 2, (mimeo, n.d.).

II. THE U.S. COPYRIGHT SCHEME[23]

Copyright has been part of the U.S. legal system since the earliest days of the Republic. It is specifically authorized in the Constitution[24], and the first U.S. Copyright Act was passed in 1789.[25] The Acts most relevant to the brittle book program are the Copyright Act of 1909[26] which was in effect for 69 years and the current Copyright Act of 1976[27] which took effect January 1, 1978. Throughout this paper, references will be made to the "old act" and the "new act", since the rules of the old act are still applicable in some cases.

A. Is the Work Protected?

The threshold question is whether or not a work is protected. Many older works that need preservation treatment are now unprotected in the public domain. They might be in the public domain for a variety of reasons: because copyright protection was never properly secured, because the term of copyright has passed or the copyright was not renewed in a timely manner, or because they were ineligible for protection (government documents, blank forms, facts and ideas, etc.). Any work that came into the public domain before the new Act took effect in 1978 may be copied freely because nothing in the new Act restores the copyright of such a work.[28]

1. Published Works

Under the old Act, copyright protection came into being when a work was "published with notice". "Publication" was the dividing line since there was no statutory protection without publication. But if a work was published without the requisite formalities, it went into the public domain immediately. As a result of this dual requirement, there was a great deal of litigation over the concept of publication and the requirement of notice.

Interestingly, despite the importance of publication, the 1909 Act did not explicitly define the term, and its meaning in the copyright context may be different than what it means to most librarians.[29] Section 26 of the Act hints at a possible definition, at least for those works that are reproduced for sale or distribution. There, it states that the date of publication is:

> the earliest date when copies of the first authorized edition were placed on sale, sold, or publicly distributed by the proprietor of the copyright or under his authority. . . .[30]

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[23] Throughout this section, the author has relied on the work of other authors, and he wishes to acknowledge that reliance here. Among the most important works used are *Nimmer on Copyright* by Mathew Bender (1989) and *Latman's The Copyright Law* Sixth ed. by William F. Patry (1986).

[24] Article I, Section 8 of the Constitution provides that: "Congress shall have the power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."

[25] The U.S. Copyright Act is based upon the earlier English Copyright Act, the Statute of Anne, first passed in 1709 (8 Anne, c.19 (1709)), and effective in 1710.

[26] Laws of 1909, c.320, 35 Stat. 1075 (1909).

[27] P.L. 94-553, 90 Stat. 2541, October 19, 1976.

[28] Despite this fact, the author of this paper has learned that there have been discussions at the Copyright Office this year concerning the possibility of amending the Act to permit copyright owners who failed to renew prior to January 1, 1978, to renew retroactively on a voluntary basis. Such a change could have a dramatic effect on the ability of the brittle books program to proceed on pre-1950 materials; it would also complicate the determination of what is protected.

[29] The need for some precision in fixing the date of publication is important because the date for renewal, the date when a work would go into the public domain, or indeed, the way a work is treated under the new Act is dependent on fixing the publication date. A work which is widely distributed to the public, but never "published" by a publisher or placed on sale in regular distribution channels might, nonetheless, be held to have been "published" for purposes of the Act.

[30] 17 USC Sec. 26 (1970 ed.)

Librarians may tend to think of publication as occurring when a work is printed by a publisher. Under the 1909 Act, however, the printing date was largely irrelevant.[31] The key concept was the release of the work to the public, and the key words are "placed on sale" or "publicly distributed".

The phrase "publicly distributed" permits protection even for items that are handed out free, provided they meet the requisite formalities. But, just because a work is distributed does not necessarily mean it has been published. For example, distribution to a limited group of people for limited purposes and without a right of further distribution[32] does not constitute publication.[33] Similarly, the oral presentation of a play or a speech does not constitute "publication", even though it may have been heard by thousands of people.[34] For statutory protection on such a work to be secured under the old Act, it still had to be published (in the traditional sense) with notice. Thus, for example, if someone wished to film Martin Luther King's "I Have a Dream" speech from the press copy, they could not conclude that the speech must be in the public domain simply based on the fact that millions of people have heard it and the document carried no notice.[35] Statutory protection might well have been secured later or it could have been protected under common law copyright as an unpublished work.[36]

In order to secure copyright protection under the Act, the owner had to affix the prescribed notice[37] in a prescribed location[38] on each authorized copy[39] of the work published in the United States. The omission[40] of the notice was generally fatal to a claim of copyright.[41] Although in many cases defective notices[42] also invalidated a claim of copyright, in some cases courts were inclined to construe the form requirements liberally, rather than invalidating a claim based on a minor technicality. As a result, it seems reasonable and prudent, if a notice of copyright is found on a published work, to presume its validity even if the notice is not on the back of the title page or is in non-standard form.

In summary, for works published in the United States between 1909 and 1978, the Copyright Act required publication with notice. If those requirements are met, it would be prudent to assume the presence of a valid claim of copyright, at least as of the indicated date.

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[31] Although it may cause complications with the date of the notice. See *infra*.

[32] For example, a draft of an article written by a faculty member and handed out to a class or circulated to colleagues for comment does not constitute publication.

[33] Nonetheless, authors are well advised to protect themselves by affixing a proper notice of copyright to the work before distributing it in this way.

[34] To consider a speech a publication would create some serious practical problems about how the notice requirement could be met. See *King v. Mister Maestro, Inc.* 224 F.Supp. 101 (S.D.N.Y. 1963) for litigation about whether or not Martin Luther King's "I Have a Dream" speech was placed in the public domain when he gave it at a public demonstration before at least 200,000 people in Washington, D.C. At that time, with Dr. King's authority, copies of the speech were distributed, without a copyright notice, to the press. Even there, the court found copyright was not lost because distribution was to a limited group for a limited purpose.

[35] If, under the old Act, one is certain that a work has been published without notice, then it is a fair inference that the work is unprotected. If, however, it is not clear that the work was published, it is problematic to infer anything from the absence of a notice.

[36] See *infra*.

[37] The notice was required to include either the word 'Copyright', the abbreviation 'Copr.', or the symbol ©; the name of the copyright proprietor; and for literary works, the year in which copyright was secured by publication.

[38] For books, etc. the notice was to be on the title page or the page immediately after the title page. For periodicals, the notice was to be on the title page or on the first page of text of each issue, or under the title heading (e.g., beneath the masthead). 17 USC Sec. 20 (1970).

[39] Copyright protection could not be defeated by an unauthorized copy being distributed without notice.

[40] This commonly occurred when contributors to a periodical or a collective work wanted to preserve their own rights in their contribution. The general notice at the beginning of the book or periodical was not sufficient; they needed to be sure that they had their own notice at the beginning of their part.

[41] Section 21 of the Act provides a saving clause for the protection of the work if the omission was by accident or mistake on only a limited number of copies. Nonetheless, no damages could be recovered from an innocent infringer who was misled by the absence of a notice.

[42] In the wrong place, lacking one of the required elements, or with an incorrect date. Although the date is supposed to be the same as the actual date of publication, in practice there can be delays between typesetting and printing that result in a delay in publication. Courts held that if the date on the work was earlier than the actual date of publication, it would be accepted since it did not extend the term of copyright. See *Callaghan v. Myers*, 128 U.S. 617 (1888). In such a circumstance, the copyright term was based on the printed date, rather than on the publication date. On the other hand, for many years, if the date on the work was later than the actual date of publication, the claim of copyright was invalidated. Eventually, the Copyright Office liberalized this rule to permit postdated notices if there was no more than a one year discrepancy. 37 C.F.R. 202.2(b)(6) (1959).

Under the Copyright Act of 1976, publication is no longer required for statutory protection,[43] and the notice requirements were liberalized by the addition of a statutory provision designed to permit a defect in the notice to be remedied within a limited period of time.

Instead of requiring publication with notice for protection, section 302(a) now states that:

> Copyright in a work created on or after January 1, 1978 subsists from its creation. . .

This provision brings into the statutory scheme many unpublished works that previously fell outside the protection of the Act.[44]

Nonetheless, because there are several ramifications that flow from publication, Section 101 of the new Act defines the term, incorporating much of what was discussed above. There, the Act provides that publication is:

> the distribution of copies . . . of a work to the public by sale or other transfer of ownership, or by rental, lease, or lending. . . . A public performance or display of a work does not of itself constitute a publication.

The new Act, from January 1, 1978 to March 1, 1989, required notice of copyright on all publicly distributed copies of a published work.[45] The position of the notice was, however, more flexible than before; the new Act only required that the notice "shall be affixed to the copies in such manner and location as to give reasonable notice of the claim of copyright."[46] In addition, under the new Act, the total omission of a notice did not automatically result in the forfeiture of copyright. Section 405(a) provided that the copyright was not invalidated if (1) the notice was omitted from only a relatively small number of copies, or (2) registration was made within five years and a reasonable effort was made to add the notice to all copies distributed after the omission had been discovered, or (3) the omission was in violation of an express written agreement. The language of these curative provisions is far from precise,[47] but cases have filled in some answers. The curative provisions suggest that under the 1976 Act, one cannot simply rely on the absence of a notice to determine that a work was in the public domain. If, however, one did rely on the absence of a notice for works published during that period, and can prove they were misled[48] because of its absence, Section 405(b) eliminates their liability.

The notice provisions changed again on March 1, 1989, the date the United States joined the Berne Convention. The Berne Convention is an international copyright convention that attempts to harmonize the copyright laws of different countries. In addition to affecting the way in which the United States treats materials published in other jurisdictions, implementation of the Convention required some changes to our own Act,[49] including the notice requirement. In order to bring U.S. law into conformity with that of other Berne Convention countries which have abandoned the notice requirement, the U.S. law now states that for works published on or after March 1, 1989, a copyright notice *may* be placed on all publicly distributed copies.[50] For works published

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[43] Despite this fact, published works and unpublished works are treated differently in important ways, some of which relate directly to the brittle books program. See also sections on unpublished works and Section 108 of the Act, *infra*.

[44] See section on unpublished works, *infra*.

[45] Section 401(a) provides that "Whenever a work protected under this title is published in the United States or elsewhere by authority of the copyright owner, a notice of copyright as provided by this section shall be placed on all publicly distributed copies from which the work can be visually perceived, either directly or with the aid of a machine or device."

[46] Section 401(c).

[47] *E.g.*, what constitutes a "relatively small number of copies?" Does the omission have to be inadvertent so that it can be "discovered"? What constitutes a "reasonable effort" to add the notice?

[48] Being misled is a factual question, in which the jury is likely to consider whether or not a library was acting reasonably. In a slightly different context, *Quinto* v. *Legal Times of Washington, Inc.* (506 F.Supp 554,562 (D.C.D.C., 1981)), suggests that good faith entails not only honesty in fact, but reasonableness as well. In that case, when a general legal newspaper reproduced an article from a student newspaper and the original article bore the author's name, the court found that [a]t a minimum [the defendant] had a duty to inquire to determine ownership of the copyright before claiming that he was misled and acted in good faith (*Id.* at 563).

[49] Legislation implementing the Berne Convention was passed at P.L. 100-568, 702 Stat 2853 (Oct. 31, 1988).

[50] 17 U.S.C.A. Sec. 401(a) (1990 pp.)

after that date, a notice of copyright is not required, but the Copyright Office is continuing to encourage the use of the notice on a voluntary basis to allow a copyright owner to defeat a claim of innocent infringement. As a result, for works published after March 1, 1989, with or without a notice of copyright, one should presume they are protected.

2. Works Published Abroad

Copyright legislation here and abroad is national in scope. Each nation has its own copyright laws applicable to the uses of a work within its borders, and whether or not a work is protected in another country is dictated by the laws of that country. Thus a work may be in the public domain in the United States, but be fully protected under the laws of other countries. Conversely, whether or not a work is protected in the United States is governed by U.S. law. It is beyond the scope of this paper to review the copyright legislation of every jurisdiction, worldwide, but libraries participating in the brittle books program should be aware of a possible problem if they intend to make documents available overseas. They may well preserve and disseminate documents perfectly legally in the United States that would cause problems in other jurisdictions.

Generally speaking, copyright protection in the United States for published works requires first publication in the United States or in a country with whom we have a copyright treaty.[51] Protection is also granted if the author is domiciled in one of those countries. In addition, the President may issue a proclamation granting protection for works and authors from particular countries if he finds that those countries accord nondiscriminatory treatment to U.S. works.[52] Finally, works published by the United Nations or by the Organization of American States are granted protection.

Under the Universal Copyright Convention, the normal U.S. formalities[53] were not required for non-domestic authors, provided published works contained the U.C.C. notice, consisting of (1) the "c" in a circle, (2) the name of the proprietor, and (3) the year of first publication, placed on the work in such a way as to give "reasonable notice" of the claim. Thus, although the dates when different countries signed the conventions are certainly relevant, it would be prudent to consider any work published with the requisite notice in any of these countries, or by a domiciliary of one these countries, protected in a manner equivalent to U.S. works.

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[51] See 17 USC 104(b). The old Act contained a similar provision in Section 9. The United States has been a member of the Universal Copyright Convention since 1955. That convention requires non-discrimination among member nations, *i.e.*, a member nation is required to give the same protection to authors domiciled in, or works published in, member countries as it does for its own authors and publications. The members of the U.C.C. include: Algeria, Andorra, Argentina, Australia, Austria, Bahamas, Bangladesh, Barbados, Belgium, Belize, Brazil, Bulgaria, Cameroon, Canada, Chile, Colombia, Costa Rica, Cuba, Czechoslovakia, Democratic Kampuchea, Denmark, Dominican Republic, Ecuador, El Salvador, Fiji, Finland, France, German Democratic Republic, Federal Republic of Germany, Ghana, Greece, Guatemala, Guinea, Haiti, Holy See, Hungary, Iceland, India, Ireland, Israel, Italy, Japan, Kenya, Laos, Lebanon, Liberia, Liechtenstein, Luxembourg, Malawi, Malta, Mauritius, Mexico, Monaco, Morocco, Netherlands, New Zealand, Nicaragua, Nigeria, Norway, Pakistan, Panama, Paraguay, Peru, Philippines, Poland, Portugal, Republic of Korea, Saint Vincent and the Grenadines, Senegal, Soviet Union, Spain, Sri Lanka, Sweden, Switzerland, Trinidad and Tobago, Tunisia, United Kingdom, United States of America, Venezuela, Yugoslavia, Zambia. See 1989 *Copyright* 13 (January 1989). The United States has also established copyright relations with other American republics through the Buenos Aires Convention (1911) and its predecessor, the Mexico City Convention. Members of the Buenos Aires Convention include Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, and Uruguay. See 1988 *Treaties in Force* 381.

[52] Such proclamations have been issued for the following countries: Argentina, Australia, Austria, Barbados, Belgium, Brazil, Canada, Chile, Costa Rica, Cuba, Czechoslovakia, Danzig, Denmark, Egypt, El Salvador, Fiji, Finland, France, Germany (pre-war), Federal Republic of Germany, Greece, Guatemala, Holy See, Hungary, India, Ireland, Israel, Italy, Japan, Kenya, Republic of Korea, Luxembourg, Mexico, Monaco, Morocco, Netherlands, New Zealand, Nicaragua, Norway, Palestine (pre-1950), Panama, Paraguay, Peru, Philippines, Poland, Portugal, Romania, Singapore, South Africa, Spain, Sweden, Switzerland, Tunisia, United Kingdom, Uruguay, Venezuela, Yugoslavia, Zaire. See 1988 *Treaties in Force* 379.

[53] Registration and deposit with the Library of Congress.

The Berne Convention substantially expands the number of countries[54] having reciprocal relations with the United States. However, the Convention, which became effective on March 1, 1989, is entirely prospective. As a result, adherence to Berne does not add any protection to works already in the public domain in the United States. Works published before March 1989 in Berne countries that do not have another copyright agreement with the United States are, therefore, unprotected in the U.S. even though they may be protected elsewhere. As noted above, the Berne Convention also does away with the notice requirement. As a result, works published in any Berne country after March 1, 1989, with or without a notice of copyright, should be presumed to be protected for the statutory duration. (See *infra.*)

3. Unpublished Works

Up to this point, the discussion has been limited to published works which, historically, have been treated very differently than unpublished works. Under the old Act, works published with notice were protected, and works published without notice were not. Those works that were not even published fell outside the ambit of the statute altogether. They were governed by state statute or the common law, in a way that is usually referred to as "common law copyright". In general, protection under state law came into being from "the moment of creation" and terminated upon publication. Except for the examples of unfixed creation noted in *infra*, the types of works that were the subject of state copyright protection were essentially the same in unpublished form as those covered by the statute. State copyright protected manuscripts and unpublished speeches. Infringing actions included acts of reproduction, performance, and distribution. Thus, although unpublished works were not covered by the old Act, common law copyright provided them with essentially similar protection.[55]

For the brittle books program, the key question is when does common law copyright terminate? The basic rule was that common law copyright continued unless and until the work was published. In that sense, it was sometimes referred to as a right of first publication.[56] Common law copyright was also terminated if the work was registered with the Copyright Office as an unpublished work.[57] In general, then, under the old Act, common law copyright existed for unpublished or unregistered works in perpetuity.[58]

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[54] Eighty-one states are members of the Berne Convention, including: Argentina, Australia, Austria, Bahamas, Barbados, Belgium, Benin, Brazil, Bulgaria, Burkina Faso, Cameroon, Canada, Central African Republic, Chad, Chile, Colombia, Congo, Costa Rica, Cote d'Ivoire, Cyprus, Czechoslovakia, Denmark, Egypt, Fiji, Finland, France, Gabon, German Democratic Republic, Federal Republic of Germany, Greece, Guinea, Holy See, Hungary, Iceland, India, Ireland, Israel, Italy, Japan, Lebanon, Liberia, Libya, Liechtenstein, Luxembourg, Madagascar, Mali, Malta, Mauritania, Mexico, Monaco, Morocco, Netherlands, New Zealand, Niger, Norway, Pakistan, Peru, Philippines, Poland, Portugal, Romania, Rwanda, Senegal, South Africa, Spain, Sri Lanka, Suriname, Sweden, Switzerland, Thailand, Togo, Trinidad and Tobago, Tunisia, Turkey, United Kingdom, United States of America, Uruguay, Venezuela, Yugoslavia, Zaire, and Zimbabwe. See 1989 *Copyright* 7 (January 1989).

[55] *Nimmer on Copyright* Sec. 2.02 (1988).

[56] *Id.*, sec. 401[B]. The case law developing this area dates to the very earliest days of copyright. See *Donaldson* v. *Becket*, 4 Burr. 2408 (H.L. 1774). Under the new act, this tradition has continued, but with less certainty. In the case of *Harper & Row Publishers Inc.* v. *Nation Enterprises*, 471 U.S. 539, 225 USPQ2d 1073 (1985), the Supreme Court held that a magazine's publication of verbatim excerpts from a manuscript of President Ford's unpublished biography constituted copyright infringement. The Court stated that "under ordinary circumstances, the author's right to control the first public appearance of his undisseminated expression will outweigh a claim of fair use." *Id.* at 555. This result is not based on state law, but it does reflect a desire to continue the old right of first publication. See also section on "fair use", *infra.*

[57] *Jones* v. *Virgin Records, Ltd.*, 643 F.Supp. 1153, 1158 (S.D.N.Y. 1986), cited in Nimmer, *supra*, nt. 33 at Sec. 4.01[B].

[58] Upon publication, of course, works either became protected by the statute if the requisite formalities were followed, or they went into the public domain.

All this changed under the Copyright Act of 1976, and many of the problems created by the dual system (state and Federal) of copyright protection have been substantially eliminated. The new Act explicitly covers all works—published or unpublished—and preempts any state law purporting to create equivalent rights.[59]

In addition, under the new Act, publication is no longer the critical dividing line that it once was, and unpublished works are brought fully into the statutory framework.[60] As a practical matter, since the statute requires a work to be "fixed in a tangible medium of expression", protection now dates from the time of fixation, whether on paper, film, or disk,[61] rather than from the time of publication. Generally speaking, then, under the new Act, all newly created but as yet unpublished works should be regarded as protected in the same manner as any other work.

Those works which were created before the new Act went into force (January 1, 1978) but had not been published and had not gone into the public domain are also brought under the statute. They are protected for the ordinary term (see *infra*), but because that duration might be short, they are provided a minimum period of protection to December 31, 2002. If they should be published prior to that date, the minimum period of protection is extended to December 31, 2027.[62]

In summary, under the old Act unpublished works were protected in perpetuity under state "common law" copyright. Under the new Act, they are protected along with other works for the ordinary term of copyright. But, because of the minimum period of protection provided for such works, any work unpublished, unregistered, and not in the public domain as of January 1, 1978 should be presumed to be protected at least through the year 2002.

4. Government Publications

The Copyright Act provides that:

> Copyright protection under this title is not available for any work of the United States Government. . .[63]

Although this provision seems simple and straightforward, there is one limitation. A work that is otherwise protected and is subsequently published in a government publication is not thereby placed into the public domain. In the original enactment of this provision in the 1909 Act, section 8 stated:

> The publication or republication by the Government . . . of any material in which copyright is subsisting shall not be taken to cause any abridgement or annulment of the copyright or to authorize any use or appropriation of such copyrighted material without the consent of the copyright proprietor.

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[59] The Act in Sec. 301(a) reads:

On and after January 1, 1978, all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and 103, whether created before or after that date and whether published or unpublished, are governed exclusively by this title. Thereafter, no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State.

[60] But see nt. 56, *supra*.

[61] Presumably, this means that if there were a work that were not fixed, it could still be the subject of state copyright law. As examples, Nimmer suggests that states might still protect choreography that has not been filmed or recorded, an extemporaneous speech, live broadcasts, and other works developed from memory and without being written down or otherwise recorded. Of course, in these circumstances there is a difficult problem of proof of ownership of the work or its infringement. Additionally, it is not yet clear whether the states will protect such works. See generally *Nimmer on Copyright*, Sec. 2.02 (Bender, 1988).

[62] See 17 USC 303 (1986).

[63] 17 USC 105 (1988).

Although this language is omitted from the current Act, the definition of "work of the United States Government" in the 1976 Act states that it is "a work prepared by an officer or employee of the United States Government as part of that person's official duties."[64] Presumably, then, if some other work is reprinted in a government publication, it does not itself become a government publication and lose protection. That this is the intended result under the current Act is made explicit in the legislative reports.[65] If government publications are reproduced as part of the brittle books program, participating libraries should be aware that although such documents are generally in the public domain, some materials within them may not be.

With regard to state or local publications there is no exclusion from protection. However, several court opinions have suggested that federal copyright protection should not be available at least for the official text[66] of the state statutes or court decisions.[67] Although it has not been so held, the principles enunciated in those cases would also seem to preclude protection for state administrative regulations, local ordinances, and the decisions of any judicial or administrative tribunal. Nonetheless, all other state publications presumably can be copyrighted. In any event, it must be said that this area is unsettled. If a state claims copyright protection in a work, the prudent person would accept that claim, unless he or she specifically wanted to challenge it.

B. How Long Does (Did) Protection Last?

The foregoing discussion indicates which works may be protected. Such protection is limited, however.[68] When the term of protection expires, the work goes into the public domain and may be copied freely. As a result, it is important to be aware of the duration for which each work is protected.

Under the 1909 Act, copyright protection began when the work was published with notice (or in the case of some unpublished works, such as dramatic works, when it was registered) and ran for a period of 28 years. At the expiration of the first term, the copyright could be renewed for an additional 28 years if the application for renewal was made before the end of the first term. Those works which were not renewed at the expiration of the initial term are now in the public domain.

In anticipation of a new copyright law with a longer term of protection, in the 1960's Congress began extending protection for those works already in their renewal term. Eventually these extensions totaled 19 years, and subsequent renewal terms were made for 47 years (the original renewal of 28 years + the 19 additional years). This meant that the period of total potential protection

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[64] 17 USC 101 (1988).

[65] The Report of the House Judiciary Committee stated: "Section 8 of the statute now in effect includes a saving clause intended to make clear that the copyright protection of a private work is not affected if the work is published by the Government. This provision serves a real purpose in the present law because of the ambiguity of the undefined term 'any publication of the United States Government.' Section 105 of the bill, however, uses the operative term 'work of the United States Government': and defines it in such a way that privately written works are clearly excluded from the prohibition; accordingly, a saving clause becomes superfluous."

"Retention of a saving clause has been urged on the ground that the present statutory provision is frequently cited, and that having the provision expressly stated in the law would avoid questions and explanations. The committee here observes: (1) there is nothing in section 105 that would relieve the Government of its obligation to secure permission in order to publish a copyrighted work; and (2) publication or other use by the Government of a private work would not affect its copyright protection in any way." H.Rept. 94-1476, 94th Cong. 2d Sess.60 (1976).

[66] Even though the official *text* may not be protected, a publisher might well add supplemental material such as indexes, digests, and annotations that do qualify for protection. Even the pagination may be protected as was suggested in the case of *West Publishing Co.* v. *Mead Data Central* 799 F.2d 1219 (8th Cir., 1986).

[67] The principle goes as far back as *Wheaton* v. *Peters*, 33 U.S. 591 (1834), where the Supreme Court refused to enforce an alleged copyright on their opinions. In *Nash* v. *Lathrop*, 142 Mass. 29, the Massachusetts Supreme Judicial Court states:

"Every citizen is presumed to know the law thus declared, and it needs no argument to show that justice requires that all should have free access to the opinions, and that it is against sound public policy to prevent this . . ."

For more decisions see *Building Officials and Code Administrators* v. *Code Technology, Inc.* 628 F.2d 730 (1st Cir. 1980).

[68] As noted *supra*, protection for unpublished works was outside the statute under so-called common law copyright and lasted indefinitely.

was 75 years. For works published prior to 1978 this system was left unchanged by the new Act. Thus, the initial 28 year term of a work published in 1957 would expire at the end of 1985[69], if renewed during that year, protection would be extended for another 47 years to the end of the calendar year 2032. If not renewed, the work would now be in the public domain.

For works created or published after 1978, the new Act adopted new rules designed to bring the United States into conformity with other countries of the world. Under the new Act, basic protection begins when the work is created and lasts for the life of the author plus 50 years.[70] For joint works by two or more authors, protection lasts for 50 years after the death of the last surviving author. Works made for hire[71] or anonymous works[72] are protected for a period of 75 years from first publication or 100 years from creation, whichever expires first. Similarly, the law creates a presumption as to the author's death at 75 years after first publication or 100 years after creation, whichever comes first, provided there is nothing in the records of the copyright office indicating that the author is still living or died less than 50 years before.[73]

C. Other Formalities

This paper has already discussed the importance of publication with notice. The other formalities required by the Act include registering the work with the Copyright Office and depositing two copies with the Library of Congress. The purpose of the deposit requirement is to enrich the collection of the library and to provide the Copyright Office with a copy of the work in case it needs to be consulted as a result of a subsequent claim. The registration requirement creates a written record of the claim of copyright. These issues are not likely to be a major concern, and only a few comments need be made about them.

The 1909 Copyright Act required "prompt" registration and deposit. Deposit of the work was required for registration, but not the reverse. In any case, neither of these formalities was a condition of copyright,[74] and their absence did not void a claim of copyright.[75] Completion of the registration requirement was, however, necessary before an action for infringement could be initiated; it was also necessary for renewal. If one is investigating a work that should have been renewed under the old Act and there is no record of registration in the Copyright office, it can be presumed to be in the public domain.

As under the old Act, the absence of registration under the new Act does not void the copyright but registration is required before an infringement action can be brought. Moreover, registration can now be used to cure a defect caused by the omission of the statutory notice, a defect that was fatal under the old Act.

D. Summary—What is Protected and What is in the Public Domain?

As of 1990, anything published before 1915 is in the public domain. Moreover, if a work was published before 1950, it must have been renewed under the old Act. If it was, it gained an

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[69] The new Act did make all copyright terms terminate at the end of the calendar year when they would otherwise expire. This change helps to avoid much of the confusion that previously resulted with copyrights terminating throughout the year. See 17 U.S.C. 305.

[70] See 17 U.S.C. 302(a).

[71] The definition of "work made for hire" makes clear that it not only includes works created in the traditional employment context, but also includes works "specially commissioned" for use in a collective work or compilation if the parties explicitly agree that the work should be so considered. See 17 U.S.C. 101. A collective work as a whole, such as a journal, as distinct from the individual contributions in the larger work (see 17 U.S.C. 201(c)), is also protected as a work made for hire because, in most cases, it is owned by an institution or corporation and published as part of that relationship. Protection for such works exists for 75 years from the date of first publication.

[72] If information is provided to the Copyright Office about the true author of such a work, then the actual life plus 50 rules apply instead of the 75-100 year presumption. See 17 U.S.C. 302(c).

[73] See 17 U.S.C. 302(e).

[74] As noted previously, however, a work that was protected under common law copyright could secure statutory copyright by registration.

[75] In the case of *Washingtonian Publishing Co. v. Pearson*, 306 U.S. 30 (1939), the Supreme Court found that deposit and registration could be made at any time after publication as long as it occurred prior to filing the infringement action. Subsequent cases allowed ever longer periods of time, including at least one where the delay was twenty seven years *(Shapiro, Bernstein & Co. v. Jerry Vogel Music Co.*, 161 F.2d 406 (2d Cir. 1946).

additional 47 years (provided, of course, it was published with the requisite notice), but if it was not, it is now in the public domain.[76] If it was published between 1950 and 1978, renewal registration must be completed by the end of the calendar year in which the twenty eighth anniversary of publication occurs. If the renewal is not (or was not) made in a timely manner, the work is in the public domain. If the work was first published after 1978, then it should be presumed to be protected. Finally, all U.S. government documents are in the public domain, except where they reproduce protected materials.

Until the new Copyright Act took over, unpublished works were protected in perpetuity unless they were registered with the Copyright Office. If they were registered, they were subject to the same statutory rules listed above. Under the new Act, unpublished works, like published works, are protected for the life of the author plus 50 years. For such works in existence before the new Act, the duration of protection varies, but in no case does protection expire before December 31, 2002. As a result, such unpublished works should, for the time being, be presumed to be protected.

E. Determining the Copyright Status of a Work

As noted above, works published prior to 1915 can be presumed to be in the public domain. Similarly, works published after 1978 can be presumed to be protected. For works published between those dates, some research at the Copyright Office is likely to be necessary to determine whether the work was registered, by whom, and whether or not it was renewed. Eventually, for works published after 1978, research will also be needed to determine the date of death of the author.

The starting point is the work itself. Assuming that it was "published", the work should be checked to determine whether or not the requisite notice is present. If not, it can be presumed to be in the public domain. If the notice is present, the date in the notice provides the first clue. If the work is older than 28 years, the records of the Copyright Office should be searched since the work should have been registered in order to renew the Copyright.[77] If a renewal registration was not made, the work is in the public domain; if it was made, then the work is protected for 75 years from the date of first publication.

The basic file at the Copyright Office is the *Catalog of Copyright Entries*, which includes both initial registrations made during the covered period and renewals. The catalog is organized into different parts according to the different classes of works. These classes include "Nondramatic Literary Works", "Performing Arts", "Motion Pictures and Filmstrips", "Sound Recordings", "Serials and Periodicals", "Visual Arts", "Maps", and "Renewals". Before 1978, the Catalog was similarly divided into the classes contained in the statute at that time. Renewals, however, were at the back of each class, rather than in a separate section of their own. The Catalog of Copyright Entries is available for purchase from the Government Printing Office, and is also available for selection through the Depository Program. It is, therefore, likely to be available in many libraries. In addition, the staff at the Library of Congress is working on a retrospective conversion project for this file, and it may eventually be available online.

The Copyright Office also maintains files and indexes covering the assignment and ownership of copyright. These may be searched at the Copyright Office, or the staff there will search the records for a $10 per hour fee. The records of ownership are extensive and useful, but there is no recordation requirement for copyright transfers, so they cannot be thought to be complete.

[76] According to the Copyright Office, 90 percent of all copyrights are not renewed. For books and periodicals, only about 5 percent are renewed. See Copyright Law Revision Study No. 30, "Duration of Copyright", Appendix B (Committee Print 1961).
[77] Of course, it could be registered during the initial term as well, but such registration is not a condition of protection.

One problem is that even with all of this, the searches may not be conclusive.[78] As noted before, works need not be registered to be protected (except after renewal). The information known about a work may not be sufficient to identify it in the records of the Office or it may also have been registered under a different title or as part of a larger work. Similarly, copyright owners may have transferred some or all of their rights in ways that are difficult to trace. Unless a way can be found to provide some certainty (see section on possible solutions, *infra*), it would be wise to presume that a work is protected unless it can be shown that it is not. (One may certainly choose not to take such a conservative approach, but that is certainly the approach of least risk.)

F. The Rights of the Copyright Owner

When a work is protected by copyright, the statute grants the owner a series of exclusive rights—activities the owner may do or authorize to be done. Subject to some major limitations[79], anything that impinges on those rights is potentially an infringement. The exclusive rights of the copyright owner include (1) the right to reproduce the work, (2) the right to prepare derivative works, (3) the right to distribute copies of the work by sale or transfer of ownership, or by rental, lease or lending, and (4) the right to perform or display the work publicly in the case of literary, musical, dramatic, choreographic, audiovisual or other similar works.[80]

1. The Making of Copies

The right to make copies for sale or distribution is at the heart of the Copyright Act. In the traditional paper-based environment, the right to authorize the making of copies for sale provides the basis from which authors ultimately derive compensation. This right has been in some tension in recent years because of the development of modern reproductive technology that permits relatively easy and inexpensive copying of complete works in single or multiple copies. The tension has been exacerbated by personal computer networks and compact disk technology, which not only increase the speed with which a work can be copied but also permit its almost instantaneous transmission from a single central datafile to a remote location.

Even though some sections of the Copyright Act support preservation within certain limits[81], it is clear that much of what is planned is the making of copies of existing works. The initial film copy is clearly a copy, although probably not an infringing one. (See *infra*.) Subsequent copies of the master are also copies, but may be somewhat more troublesome, particularly if they are sold to libraries or individual readers. Loading the work into an online datafile is also probably copying, although until the work is distributed to a user, there may be no actual harm to the copyright owner. When the work is distributed electronically, in whole or in part, some of the copying that occurs may be problematic and some may not. One screen of data from a remote file need not be permanent, and in most cases would certainly be insubstantial. But, if an entire work were copied from a remote datafile into the memory of a personal computer, a copyright owner might have a greater claim. He or she would be still more concerned if the work were saved to disk for later use or were printed out on paper.

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[78] Even the Library of Congress itself found it difficult to rely on searches of the records. (See discussion of the Library of Congress preservation project, *infra*.)

[79] See generally, 17 U.S.C. Sections 107-112, and Section 117 (1982). The major limitations include fair use (Section 107), certain uses by libraries and archives (section 108), the first sale doctrine (section 109), performances or displays of certain works in educational, religious or other limited and non-public settings (section 110), some secondary transmissions (section 111), and the making of copies of computer programs as an essential step in using the program or for archival purposes (section 117). Some of these, especially those in section 108, are explicitly related to preservation. For a full discussion of those limitations see *infra*.

[80] The exclusive rights of the copyright owner are enumerated in 17 U.S.C. Section 106 (1982).

[81] See discussion of Sec. 108(b), 108(c) and 117, *infra*.

Some commentators have noted that compensation to an author based on the sale of copies may be outmoded because works need no longer be contained in physical objects called copies.[82] Rather, they can be transmitted to a user in whole or in part electronically without a permanent copy ever having been made. Ultimately, it may be that a new means of compensating authors will have to be developed. Many computer services now compensate copyright owners based on use. Some increase the level of compensation if a permanent copy is made, but compensation based on use rather than copies seems to be the norm in the electronic environment. This development has prompted at least one commentator to posit the need for a "useright"[83] to supplement existing copyright and to provide a new basis for compensation. The development of such a concept could be useful since it might permit the copying of the works, but necessitate compensation to the owner when the work was actually used by an individual. Use could be tracked by the computer storing the works with an accounting made on a periodic basis.

2. The Preparation of Derivative Works

The right to control the making of derivative works was originally designed to permit an author to take advantage of foreign translations of his or her written work. It has also been very useful for authors who prepare a stageplay or a movie from an earlier novel. In the computer context, new questions are being raised about derivative works since computers can be easily used to generate a new work from older data or information.[84]

The simple preservation of existing works is unlikely to create any issues of derivative works. If, however, libraries decide to provide "improvements", they may run into the gray area caused by the use of new technology to enhance existing works. Colorized films are one example of a derivative work causing potential problems.[85] If libraries were to use computer software to automatically generate summaries or indexes of works,[86] or if they developed other ways to enhance the original—for example through the enhancement of photographic images—they should be aware of a potential problem area.

3. The Distribution of Copies by Sale, or Transfer of Ownership, or by Rental Lease or Lending

The right to control the distribution of copies is a corollary of the right to control reproduction since it has been from the distribution of copies that income to the owner has been derived. Similarly, those who established the Commission on Preservation and Access determined that the mere making of the preservation copy is insufficient; those copies need to be made available to libraries and scholars since there is no point in creating the copy if it can never be used.

An important limitation on the right to control the distribution of a work is provided in Section 109 of the statute. That section permits a lawful owner of a particular copy of a work to sell or otherwise dispose of a work or to display it publicly.[87] In other words, when someone purchases a copy of a work, the original creator no longer has control over what happens to that copy.

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[82] See generally *Intellectual Property Rights in an Age of Electronics and Information*, U.S. Congress, Office of Technology Assessment, 1986.

[83] See Kost, "USERIGHT", in *Intellectual Property Issues in the Library Network Context*, Proceedings of the Library of Congress Network Advisory Committee Meeting, March 23-25, 1988, Library of Congress Network Planning Paper Number 17 at 71 (1989).

[84] See generally, OTA Report, *supra* nt. 81.

[85] Colorized films raise at least two problems. The first is whether or not the new film is a derivative work and who owns the rights to it. An even earlier question is whether the "owner" of an artistic work can change it in a way that is significantly different from what the original artist produced. See "Moral Right Protections in the Colorization of Black and White Motion Pictures: A Black and White Issue," 16 Hofstra L.R. 503 (1988) and "Motion Picture Colorization, Authenticity, and the Exclusive Moral Right," 64 N.Y.U. L.Rev. 628 (1989).

[86] Indexes and summaries are usually seen as new works, not infringing on the original, but if they are automatically generated by a computer working on the text itself, they could begin to blur the line. If, in particular, high quality summaries were generated that could be used in place of the original then the author might have some concern. Abridgments or condensations have long been considered to be derivative works (See Copyright Law Revision, Part 6: Supplementary Report . . . Committee Print, 1965, 17), and the fact that such works might be generated automatically is unlikely to affect the basic principle.

[87] 17 U.S.C. 109 (1982).

The creator retains rights in the intellectual component of the work, but not in the physical object.[88] This policy, known as the first sale doctrine, is a fundamental principle in American copyright law, and provides the legal foundation for library lending. Absent this provision, libraries might well find themselves unable to lend a work without the permission of the author.[89]

One exception to the first sale doctrine was recently enacted prohibiting the rental, lease or lending of phonorecords for commercial gain without the permission of the copyright holder. This amendment to the law was enacted to stop the spread of record piracy shops which would rent or lend records in a way that permitted (and even encouraged) users to make recordings of the work. An exemption for libraries specifically permits them to continue their practices of lending such materials.[90] In 1989 another exception to the first sale doctrine prohibiting the rental, lease or lending of software was introduced in the Senate.[91] It is expected that if enacted, this new bill will also contain an exemption for non profit libraries.

All of this suggests that the right to control the distribution of a work is an area of some ferment and that if copyright owners perceive that preservation activities and programs are interfering with that right, they might become concerned.

4. The Public Performance or Display of a Protected Work

Under Section 106, the copyright owner has the exclusive right to publicly perform or display certain works, including literary works. Proposals to make and distribute physical copies of a work do not implicate either of these rights, but making them available through an online database without the permission of the copyright holder might constitute an infringing public display. Under the statute

> The . . . definition of "display" covers any showing of a "copy" of the work, "either directly or by means of a film, slide, television image, or any other device or process." In addition to the direct showings of a copy of a work, "display" would include the projection of an image on a screen or other surface by any method, the transmission of an image by electronic or other means, and the showing of an image on a cathode ray tube or similar viewing apparatus connected with any sort of information storage and retrieval system.[92]

Thus, showing a work on a computer terminal would almost certainly constitute a display. However, a display infringes the rights of the owner only if it is public. Section 101 of the Act states that to perform or display a work publicly means—

> (1) to perform or display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; or
>
> (2) to transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.

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[88] For an explanation of the distinction between the literary work which is protected and the physical embodiment of it which is not, see *Nimmer* Section 2.03[C] 1987(rev.).

[89] Several countries have enacted statutes creating a public lending right. Such statutes exist in Great Britain, Canada, Australia, New Zealand, the Netherlands, West Germany, Iceland, Denmark, Norway, Sweden, Finland, and others. Under such statutes, authors are compensated for library holdings or library circulation of their works. In some cases, the charges are made annually based on a survey of circulation statistics or library holdings records. In some cases, a surcharge is added on once at the time of purchase. For a review and survey of issues concerning the Public Lending Right see "Closing the Book on the Public Lending Right", 63 N.Y.U. L.Rev. 878 (1988).

[90] 17 U.S.C.A. Sec. 109(b), P.L. 98-450, 98 Stat. 1727 (1984).

[91] See S.198 introduced by Senator Hatch on January 25, 1989.

[92] See 17 U.S.C.A. Sec. 106, nt. (1977).

Under these definitions, the transmission of a work for display in a library is likely to be considered a public display, even if it is only viewed by one person at a time. If the work is transmitted to an individual member of the faculty for use in his or her office, the situation is less clear, but assuming the datafile is available to anyone (*i.e.*, the public), then again it is likely that an infringing display has been made.

To emphasize this probable outcome, the legislative history of this provision makes it clear that one of the most important reasons for giving copyright owners the right to control public displays was precisely to prevent the development of a large library database whereby a single copy of a work could be loaded into a datafile for subsequent distribution to libraries without appropriate compensation to the copyright owner. In a report prepared by the Register of Copyrights, the Copyright Office indicated particular concern over developing information technology:

> The use of closed and open-circuit television for presenting images for graphic and textual material to large audiences . . . could, in the near future, have drastic effects upon copyright owners' rights. Equally if not more significant for the future are the implications of information storage and retrieval devices; when linked together by communication satellites or other means, these could eventually provide libraries and individuals throughout the world with access to a single copy of a work by transmission of electronic images. It is not inconceivable that, in certain areas at least, "exhibition" may take over from "reproduction" of "copies" as the means of presenting authors' works to the public, and we are now convinced that a basic right of public exhibition should be expressly recognized in the statute.[93]

Absent an amendment to the statute, because of this history caution is needed in this area. If protected works are to be distributed over an electronic network, permission should be secured from the affected copyright owners and reasonable royalties or use charges may be need to be negotiated.

Sections 110 and 111 of the Act do carve out some important exceptions to this right that might be helpful, although they are carefully circumscribed and therefore limited in application. Section 110 exempts performances or displays used in the course of face-to-face teaching activities, for certain other related instructional purposes, for use in worship services, and for transmission to the blind or physically handicapped who are unable to read or receive the material by ordinary means. By virtue of this last exception, under appropriate circumstances spelled out in Section 110 (8), materials loaded into an online datafile could be combined with artificial speech systems to enhance the availability of library materials to the visually handicapped. This could be a major new service to the handicapped but is, of course, a narrow exemption to the broader display policy. The exemption for instructional uses could also be helpful, but it, too, seems far too limited to be useful in the context of the broad range of materials in need of preservation.

Section 111 provides exemptions for secondary transmissions, *i.e.*, the retransmission within a hotel or for instructional purposes or by cable systems subject to a compulsory licensing scheme. This section establishes limited exemptions for carriers who act passively to relay data created or originally transmitted by others. To come under the provisions of 111, the carrier must have:

> no direct or indirect control over the content or selection of the primary transmission or over the particular recipients of the secondary transmission,[94]

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[93] "Copyright Law Revision Part 6: Supplementary Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law: 1965 Revision Bill", 89th Cong., 1st Sess. 20 (Comm Print 1965).
[94] 17 U.S.C. Sec. 111 (1982).

and its activities must:
consist solely of providing wires, cables, or other communications channels for the use of others. . . .[95]

Since the brittle books program is focused on the preservation, conversion, and possible initial transmission of the information, this section is not likely to be relevant, although it might be relevant to a network that provided a delivery system on behalf of a cooperative library effort.

G. Limitations on the Rights of Copyright Owners

Section 106 of the Act (discussed above) defines the rights held by a creator. The next several sections establish limits on those rights in order to balance the rights of information users with those of the creators. Unlike the patent system, which grants a virtual monopoly for new inventions, the copyright system tries to strike a much more delicate balance among many competing interests. In furtherance of the broad social goal of disseminating knowledge, Congress has, therefore, carved out a series of exemptions to the "exclusive rights" of the owner to permit uses of a work that would otherwise constitute an infringement.

This paper has already discussed three of the limits on the rights of the owner provided under the Act: the First Sale Doctrine contained in Section 109, the educational and religious exemption for displays and performances provided in Section 110, and the exemption for secondary transmissions in Section 111. Sections 107 on fair use and 108 on reproduction by libraries will be discussed at some length below since they are the sections most directly relevant to this paper. Sections 112 through 118 create some additional exemptions.[96] Most of these are not substantively relevant here and will not be discussed at length. However, a few of them—most especially those related to compulsory licensing—might provide a useful model for a solution to the preservation problem, and will be discussed in that section of the paper.

1. Fair Use[97], Section 107

Fair use is a judicially created equitable rule of reason to permit limited copying of protected works.[98] It was developed to permit researchers to copy portions of a work into their notes and to use excerpts from a protected work in a subsequent work. Examples of the use of protected work in the creation of a new work include literary criticism, scholarship, news reporting, parody, etc. When the new Act was passed, it attempted to incorporate the judicial doctrine of fair use as it had developed to that time.[99] As enacted, the statute gives examples of possible fair use and provides a list of criteria for the courts to review in individual cases to determine whether or not a particular use is fair:

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[95] *Id.*

[96] Section 112 exempts some very limited copying of performances or displays by groups that already have a license to transmit them. After transmitting the copy, it must be destroyed or preserved solely for archival purposes.

Section 113 grants rights to produce useful articles from pictorial, graphic, and sculptural works but limits those rights to those granted by the copyright statute or state law as of December 31, 1977.

Section 114 limits the copyright in a sound recording to the duplication of that actual recording. It does not include a performance right or prevent someone else from independently recording the same pattern of sounds.

Section 115 creates a compulsory license for the making of a sound recording from a musical work. Section 116 creates a compulsory license for juke boxes. Section 118 creates a compulsory license to public broadcasting for the use of non-dramatic literary and musical works as well as pictorial, graphic, and sculptural works. Compulsory licensing offers a possible vehicle by which the brittle books program might be able to proceed and will be discussed more fully *infra*.

Section 117 establishes some important rights vis-a-vis computer programs.

[97] The first part of this section is taken largely from the author's paper "Intellectual Property Issues and Information Networks: A Background Paper", published in Library of Congress Network Planning Paper Number 17, 1989, Proceedings of the Library of Congress Network Advisory Committee Meeting held March 23-25, 1988.

[98] Of course, to the extent that the brittle books program is dealing with works that are no longer protected, the fair use and other copying provisions are not of concern. They are, however, of concern when a library wants to copy—on paper, film, or electronically—more current materials, still protected by the Copyright Act.

[99] Both the House and Senate reports indicated their intent "to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way." At the same time, however, they were also careful to indicate that it was not their intention to freeze the doctrine in the statute especially during a period of rapid technological change . . . ." See H.R. Rep. 94-1476 at 66 (1976) and S.Rep. 94-473 at 62 (1975), cited in Patry, *The Fair Use Privilege in Copyright Law* at vii (1985).

> Notwithstanding the provisions of section 106, the fair use of a copyrighted work . . . for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—
>
> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
>
> (2) the nature of the copyrighted work;
>
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
>
> (4) the effect of the use upon the potential market for or value of the copyrighted work.[100]

Researchers who have reviewed the history of the fair use doctrine have found that in most cases finding fair use before the 1970's, the use in question was for a second author to use portions of a copyrighted work in a new creative work.[101] (This is sometimes referred to as "productive use".) In any event, in no cases before *Williams and Wilkins* v. *U.S.*[102] was the copying of an entire work to be used in the same manner as the original found to be fair use.[103] That case ended when the Supreme Court affirmed the Court of Claims opinion in favor of the Library by a 4 to 4 vote, with no opinion. The Court's failure to rule on the issue left the law in a state of some uncertainty.

The nature of the question and the terms of the discussion had changed by the time of *Williams and Wilkins* because photocopying technology had become sufficiently advanced to permit the development of such a large-scale program. The continuing advance of technology and the development of online full text information networks takes this question one step further. Now the same documents from which the copies were made in *Williams and Wilkins* can be stored in a network and delivered directly to the user electronically. In one sense, if such a database were established for document delivery over a network, it would simply make the delivery of the information already upheld by the court more efficient. In another sense, though, it is a further step down the road of making copies available to readers without compensation to the author. This is a long way from the original notion of fair use and a long way from the foundation of copyright that sought to provide an economic incentive for the production of new works.

Adding to the complexity of the question is the issue of private use. In *Sony* v. *Universal Studios*[104] the Court held that private off-air videotaping of free broadcast programs for purposes of time shifting was fair use. The Court defined time shifting as:

> the practice of recording a program to view it once at a later time, and thereafter erasing it. Time-shifting enables viewers to see programs they otherwise would miss because they are not at home, are occupied with other tasks, or are viewing a program on another station at the time of a broadcast they desire to watch.[105]

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[100] 17 U.S.C. Sec.107 (1982).
[101] Patry, *supra* nt. 98 at ix.
[102] In *Williams and Wilkins* v. *U.S.* the National Library of Medicine was sued for infringement by a medical publisher for providing photocopies of articles to medical professionals. Among the findings were that in 1970 the National Institutes of Health made 86,000 copies constituting 930,000 pages and in 1968 the National Library of Medicine made 120,000 copies, totalling 1.2 million pages. The trial judge found that this kind of copying constituted infringement in a ruling that alarmed the library community. (See 172 U.S.P.Q. 670 (1970).) The Court of Claims reversed at 487 F.2d 1345 (Ct.Cl 1973) and the Supreme Court upheld that reversal, without opinion, by an equally divided court at 420 U.S. 376 (1975).
[103] Seltzer, *Exemptions and Fair Use in Copyright* 24 (1978).
[104] 464 U.S. 417, 78 L.Ed.2d 574, 104 S.Ct. 774 (1984), rehearing denied March 19, 1984, 465 U.S. 1112, 104 S.Ct. 1619, 80 L.Ed.2d 148.
[105] Id. at 423.

Although the discussion of the Court is quite broad, the actual holding is limited to the factual situation of private home videotaping for later viewing and ultimate erasure. In reaching that conclusion, the Court emphasized the private, noncommercial character of the use. In *Sony*, the copy was not a substitute for a purchase, it was a substitute for viewing at a particular time.

Seltzer, too, identifies private use as one of the critical points in fair use analysis. The traditional fair use cases involve copying by hand (or by a typewriter) "by a private reader, scholar, writer, student or teacher for the copier's own private use."[106] In a note in *Williams and Wilkins*, the Court of Claims says "it is almost unanimously accepted that a scholar can make a handwritten copy of an entire copyrighted article for his own use"[107] Traditionally, then, copies made by hand for private use are considered fair use. Moreover, after *Sony*, the mechanical reproduction of a complete work under very limited circumstances has also been held to be fair use.

Commentators have suggested that of the four factors listed in the statute, the most important is the last[108], dealing with the economic impact of copying. The economic impact of copying by hand is limited, but high speed photocopiers and computers can now reproduce even more efficiently than printing. Even if it is not the dominant criterion, the original purposes of copyright—providing an economic incentive for creation—suggest that fair use is far more likely to be found where the copying has a limited impact on the "potential market for or value of the copyrighted work."[109] In *Sony*, the Court seems to have moved toward the economic analysis, since it created a presumption against all commercial use.

> . . . every commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright. . . .[110]

In this context, commercial use would probably include commercial copying as well as copying for use in a trade, business, or profession. It might or might not include the preservation proposals of the brittle books program depending on how many copies are made and whether or not there is a profit.

Several recent decisions have raised serious questions about fair use in the context of unpublished material. In *Harper and Row Publishers Inc.* v. *Nation*[111] the Supreme Court held that publication of verbatim excerpts from a manuscript due for publication was not fair use. No doubt, this result was due to the old doctrine that gives the author the right of first publication.[112] The Second Circuit in *Salinger* v. *Hamilton*[113] held that a biographer's quoting and paraphrasing of unpublished letters by author J.D. Salinger was not a fair use. The Salinger decision has been widely criticized as presenting a major roadblock to the use of unpublished scholarly material, particularly manuscript collections that have been placed in libraries by still living individuals. Most recently, the Second Circuit again addressed the question in *New Era Publications International* v. *Henry Holt & Co.*[114], a case involving the use of both published and unpublished writings of L. Ron Hubbard, the founder of the Church of Scientology. Although it did not need to address the fair use question to reach the result in the case, the Court did reaffirm its view that "unpublished works normally enjoy complete protection"[115]. The results in these cases all clearly turn on the fact that the copied materials were unpublished.

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[106] Seltzer, *supra* nt. 102 at 26.
[107] 487 F.2d 1345, 1350 (Ct.Cl. 1973).
[108] The Copyright Office is not so sure about this view, and David Ladd believes it is simply incorrect. They find nothing in the statute to distinguish any one criteria from another and believe the entire point of the section is to suggest a weighing and balancing of all the criteria. To suggest that one is more important impermissably reduces the relevance of the others. Conversation with Mary Beth Peters, May 5, 1989.
[109] 17 U.S.C. Sec. 107(4)(1982).
[110] *Sony*, nt. 103 at p. 451.
[111] 471 U.S. 539, 225 USPQ2d 1073 (1985).
[112] See *supra*.
[113] 811 F2d 90 (CA2 1987).
[114] 873 F2d 576 (2d Cir. 1989).
[115] *Id.* at 583.

In response to these cases, Representative Kastenmeier introduced HR 4263 on March 14, 1990 to clarify that fair use applies to both published and unpublished works. The proposed legislation would amend Section 107 of the Act by inserting the phrase "whether published or unpublished" after the phrase "the fair use of a copyrighted work".

Seltzer has suggested a simpler formulation of the fair use doctrine than that contained in the statute that helps the analysis in all the fair use cases:

> Fair use is use that is necessary for the furtherance of knowledge, literature, and the arts AND does not deprive the creator of the work of an appropriately expected economic reward.[116]

Such a formulation is consistent with the underlying purposes of the Copyright Act. Furthermore, it would nicely accommodate preservation since libraries in general, and preservation programs in particular, exist primarily "for the furtherance of knowledge, literature, and the arts." This formulation does raise the issue of what is an "appropriately expected economic reward", a question implicit in any discussion of fair use. That question will be particularly relevant for the preservation program as libraries bargain with publishers over preservation (and subsequent redistribution) of out-of-print works.

Some have suggested that new technology has changed the concept of what is "fair". It may be instead that the new technology has changed the perception in the Seltzer formulation of what constitutes something for which it is appropriate to expect an economic reward. In the preservation context, publishers of the majority of works from the 1940's, 50's, and 60's would probably not have anticipated continuing economic reward from a program simply designed to keep their works on library shelves. Alan Latman has suggested that the answer to the question of what constitutes an appropriate expectation might be whether the reasonable owner would consent to the use.[117] Early experience with medical publishers at the National Library of Medicine[118] suggests that publishers will work with the library community on this problem and that they will consent to at least limited copying for preservation purposes. Although the Seltzer/Latman formulations are still equitable rules of reason, they adopt the traditional "reasonable man" approach familiar in other legal contexts and may be somewhat simpler to apply than the four-part test of the statute. They also suggest an analytical framework that helps to solve the preservation dilemma, at least in part.

2. The Library Exemptions—Section 108

During the early discussions about the proposals for the new Act, the application of fair use to library photocopying seemed uncertain. Some of the participants believed that fair use photocopying was a contradiction in terms,[119] and the library community became increasingly concerned that fair use might not meet its needs for protection. As a result, librarians sought either specific exemptions for library copying or a fair use provision that expressly included photocopying.[120] As the debate became increasingly acrimonious, Williams and Wilkins filed its

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[116] Seltzer, nt. 102 at p.31.

[117] Latman, "Fair Use of Copyrighted Works", in U.S. Copyright Office, Copyright Law Revision, Study No. 14, 86th Cong., 2d Sess. 31 (Senate Judiciary Comm. Print 1960).

[118] See *infra*.

[119] Irwin Karp of the Authors League said categorically:

"Fair use doesn't cover photocopying, and I don't think that any court would hold that it did. Certainly those of us who were opposed to the photocopying section in the earlier draft do not assume for a moment that this section on fair use by any means permits the types of activities that were covered by that section." Cited in *Report of the Register of Copyrights, Library Reproduction of Copyrighted Works (17 U.S.C. 108)*, 22 (1983).

The difficulty the Courts had with the Williams and Wilkins case demonstrates, at least, the difficulty of applying fair use to photocopying, especially photocopying on a large scale.

[120] For a review of the background to the library exemption, see the Report of the Register of Copyrights on Library Photocopying, *id.* at 12 *et.seq.*

lawsuit against the National Library of Medicine, raising squarely the question of whether library photocopying fit within fair use at all. As the litigation progressed and the apparent result swung from one side to the other, the need for a safe haven for at least some library copying became clear.

The earliest copying provision to be included in the draft bills was a provision for the preservation and security of unpublished works and manuscripts.[121] This proposal was very similar to the language that eventually became Section 108(b) and reflects both an early concern with preservation—particularly for unpublished materials—and a recognition that copying such materials for the purposes of preservation is not likely to infringe on any publisher's existing economic interests.

The section on the copying of archival materials remained the only copying provision in the various bills until late January 1969 when S.543 introduced the basic structure and elements of 108 as it is today, including both preservation sections, 108(b) and 108(c). When section 108 was added, the report of the Senate Judiciary Committee stated that its provisions were not intended to eliminate the possibility of fair use for library copying, noting that "[t]he rights given to the libraries and archives by this provision of the bill are *in addition* to those granted under the fair use doctrine."[122] (Emphasis added.) Similar language was incorporated directly into the statute in section 108(f)(4) which states that the rights of "this section" do not "in any way affect the right of fair use. . . ." The relationship between fair use copying and 108 copying has been hotly debated. Some contend that 108 dealt with library copying exhaustively and it would be unfair to publishers to build further copying on top of it. Others believe that 108 simply carved out a safe haven to provide libraries with known areas of certainty. This debate will be discussed more fully *infra*.

Section 108 is a complex section of the Act in which one section grants rights while other sections balance those rights from the point of view of the publisher by limiting their applicability or creating barriers to their use. The basic structure of 108 is to establish conditions for the applicability of the section in subsection (a) and to limit the kinds of works to which it applies in subsection (h). Subsections (b) through (f) establish three basic categories of exemptions including, under specified circumstances, preservation copying, copying for interlibrary loan, and unsupervised coin-operated photocopying. Section (g) together with the fist part of section (a) make it clear that 108 only permits the making of single copies.

In addition to limiting all 108 copying to single copies, section 108(a) establishes three conditions which must be met for a library to take advantage of the exemptions. First, the copying must be made without any purpose of "commercial advantage." Second, the library must either be "open to the public" or at least available "to other persons doing work in a specialized field." Third, the copy must bear a notice of copyright. The first pre-condition requiring no commercial advantage is not likely to be a major problem for preservation program. Should the nature of the program change character in the future, however, to become, for example, a commercial supplier of out-of-print works to libraries and scholars, then this condition would, of course, not be met.[123] The second condition—that the library must be "available" to researchers beyond the organization of which the library is a part has been generally found to be no condition at all. Seltzer writes:

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[121] In a draft version of the bill, Section 108 provided "Notstanding [sic] the provision of section 106, it is not an infringement of copyright for a nonprofit institution, having archival custody over collections of manuscripts, documents, or other unpublished works of value to scholarly research, to reproduce, without any purpose of direct or indirect commercial advantage, any such work in its collection in facsimile copies or phonorecords for purposes of preservation and security, or for deposit for research use in any other such institution." *Id.* at 38, nt. 53, no bill number cited.

[122] S. Rept. 91-1219, September 22, 1970 p. 6. Unfortunately, the report has no further elaboration of this contention.

[123] Such a scenario can easily be envisioned if funding for preservation efforts becomes problematic. At that point, a more commercial approach might be seen as the only viable way to keep the effort alive.

> . . . the sole requirement that a collection be 'available...to other persons doing research in a specialized field' is wide enough, for practical purposes, to leave no institution or collection of works outside it. There are no enforceable limitations on 'specialized fields,' no encumbrances on the meaning of 'available,' no requirement that the collection be publicly owned or nonprofit, and accordingly no definition of the terms 'library or archives'. . . . In short, the definition of what might constitute a qualifying library, permitted under the copyright law to provide photocopies for individual users, might well be: 'almost anything at all.'[124]

The third precondition is relatively easy to meet since copying the full work will automatically contain the original copyright notice. Participating libraries may also want to take affirmative steps to protect themselves by applying a further warning or notice of copyright to each work copied.[125]

Section 108(h) states that most of the copying rights granted to libraries under 108 do not apply to certain types of works, including pictorial works, graphic works, motion pictures, etc.[126] The net result of this subsection is to limit the general applicability of the library exemption to traditional printed works—books and periodicals—as well as audio-visual news programs. Fortunately, this limitation on library copying by type of materials does not apply to preservation copying, indicating a statutory design to permit preservation copying of the broadest range of materials, including films, musical works, and other pictorial or graphic works.

The specific rights given to libraries to copy for preservation purposes are now contained in two sections, 108(b) dealing with unpublished works, and 108(c) dealing with published works:

> (b) The rights of reproduction and distribution under this section apply to a copy or phonorecord of an unpublished work duplicated in facsimile form solely for purposes of preservation and security or for deposit for research use in another library or archives of the type described by clause (2) of subsection (a), if the copy or phonorecord reproduced is currently in the collection of the library or archives.
>
> (c) The right of reproduction under this section applies to a copy or phonorecord of a published work duplicated in facsimile form solely for the purpose of replacement of a copy or phonorecord that is damaged, deteriorating, lost, or stolen, if the library or archives has, after reasonable effort, determined that an unused replacement cannot be obtained at a fair price.

The two sections grant slightly different rights. For published works, only a limited right to copy is permitted.[127] This copy should presumably be retained by the library.[128] By contrast, for unpublished works there is also a limited distribution right. A copy made under that section might be retained by the library, but it might also be deposited in another library. Provided the other conditions are met (see *infra*), these sections will permit libraries (not other organizations) to

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[124] Seltzer, nt. 102, *supra*, at 99.

[125] The form of the notice required by this section has been the subject of considerable debate. Publishers want the full statutory notice of copyright to be applied in all cases. Librarians, for reasons of efficiency, would like to limit the notice requirement to a simple, general warning that the material is (or may be) protected by copyright. The Register found no clear Congressional intent on this point, but believes that since the phrase used was "notice of copyright", it is more likely that the full notice was desired. (See 1983 Report of the Register of Copyright *supra* nt. 103 at 74.) Since at least at the outset libraries participating in the preservation program will be copying full works, the copies will, of necessity, contain the original notice of copyright. That should meet the requirement of the statute, even under the Register's interpretation. The libraries might wish to protect themselves further, however, by incorporating a generalized copyright warning on each film image and in eye-legible form on each piece, or on the fiche envelope or other packaging. The problem will need further evaluation, however, if in the future the libraries distribute works or parts of works online. At a minimum in that case, the screen display and any printouts should have a line displaying a copyright warning.

[126] An exception to this is allowed for pictorial or graphic works that are illustrations in other works lawfully copied for distribution on interlibraryloan under section 108(d) or 108(e).

[127] All copying permitted by Section 108 is controlled by the single copy limitation established in 108(a).

[128] Alternatively, if the library would be depositing its original in a central storage facility, presumably it could do the same thing with the copy. It could not, however, do both under the authority of this section.

make single copies of protected works for preservation purposes. Copies of unpublished works may be deposited in another library, but the copy of the published work should be probably be retained be in the originating library, although it is at least arguable that it could be deposited in a central facility provided the copy has, in fact, replaced the original.

Both sections permit copying "in facsimile form". "Facsimile form" is not defined in the statute, but it appears that the intention of the section was to limit reproduction to analog copies of the work, rather than any digital or machine-readable form.[129] Although it is arguable that other newer processes that produce the same result should also be permitted, it is unlikely—without an amendment to the statute—that such an argument could be applied to the direct conversion and storage of documents in machine-readable form.[130] This limitation will not hinder the initial work of the preservation program since at the outset, most works will be preserved by filming. Should it become desirable (or even just more efficient) to digitize such documents directly from the original, that appears to be beyond the scope of what is now permitted under section 108.

The purposes for which such copies can be made are also slightly different in the two sections. Unpublished works may be copied for preservation and security, or for deposit[131] in another library. As written, preservation and security appear as one standard, although they are different concepts. If they are a single standard, then presumably a work may not be copied for security reasons alone, or for preservation alone. Such works may be copied for both reasons together. The thinking about this language may have been that the integrity (security) of a deteriorating collection may need to be assured through preservation efforts. Nonetheless, this interpretation seems strained and it could easily be found that there really are three distinct reasons (preservation, security, and deposit) for which unpublished materials might be reproduced by a library under this section.[132]

The purposes for which a published work may be copied are more limited. Section 108(c) permits such copying for replacement of a copy that is damaged, deteriorating, lost, or stolen. It is potentially important to note that this is not a right to copy for general preservation purposes; it is a right to copy for replacement under certain specified conditions.

It may be, for example, that libraries will want to make preservation copies before the work is too badly deteriorated but retain the original work until such time as it is no longer usable. It is unclear whether a literal reading of the current section would permit such activity. Yet it is reasonable to assume that the preservation copy will have to be made sometime before the work is completely lost, and that a library may prefer to continue to use the original as long as possible. This may be the kind of situation where a "reasonableness" standard needs to be elaborated. On the one hand, the section does not appear to contemplate the making of a preservation copy as the work arrives new in the library, as some librarians have (for very good reasons) proposed. Rather, it contemplates that there has already been some level of deterioration. On the other hand, it would be unreasonable to wait so long that the work is so far deteriorated that it is problematic to make the preservation copy. Somewhere in between there is a middle ground where the library would not be making copies of new works but where the original is not so far gone as to put it at risk in its entirety.

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[129] The House Report specifically indicates an intention to limit such reproduction to microfilm or electrostatic process. See House Report 94-1476 at 75 (September 3, 1976).

[130] *Id.*

[131] After the Salinger case and the L. Ron Hubbard case, described *supra*, a library would be wise to be careful about this deposit privilege. Although those cases appeared in the fair use context, they did uphold an author's right to first publication. Despite the fact that section 108 gives libraries the right to deposit such works in another library, they should not do so in a way or in such a number of copies that it might be viewed as tantamount to "publication". Again, the single copy rule is important.

[132] This language was in the first version of the section cited at nt. 120, *supra*. The report issued at that time sheds no light on the interpretation of this section.

Both sections establish conditions for reproduction, although the conditions on copying published works are more significant. Unpublished works copied under section (b) to be deposited in another library may be placed there "for research purposes". In the case of print material, it is hard to imagine any other reason for such copies being made, although an unpublished film could presumably be copied and deposited with another library to be used for instruction or even just for entertainment. Although neither of those purposes would appear to qualify for protection under this section, the first might be found to be fair use.[133] This section also requires that the publication already be in the library or archive supplying the copy.[134] Presumably, this is to prevent multi-generational copying, where the supplying library is actually making a copy of a work supplied to it by another library under authority of the same section.

Before a replacement copy of a published work may be made under section 108(c), the library must first make a reasonable effort to obtain an unused replacement at a fair price. For relatively new materials that simply wear out from heavy use, this requirement makes some sense as an effort to protect the economic interests of the publisher. In the context of a brittle books preservation program, however, this condition makes little sense. In most cases of brittle pages, absent reprinting, another unused copy is likely to be virtually the same age as the deteriorated volume, and therefore in the same poor condition. Interestingly, in Seltzer's paraphrase of this section, he uses the word "new" rather than "unused"[135], and it may be that that is the real intent of the statute: to insure, before copying, that the publisher does not still have copies available for sale. At the very least, it is reasonable to expect that the replacement copy will not merely be unused; it should also be in sufficiently better condition to justify the price paid. For the older materials involved in the preservation program, this is unlikely.

The committee reports do not shed much light on when and to what extent an investigation is necessary. The House report states:

> The scope and nature of a reasonable investigation to determine that an unused replacement cannot be obtained will vary according to the circumstances of a particular situation. It will always require recourse to commonly known trade sources in the United States, and in the normal situation also to the publisher or other copyright owner (if such owner can be located at the address listed in the copyright registration), or an authorized reproducing service.

Although this report language sounds absolute, a "reasonableness" standard must take into account varying situations. In the case of long out-of-print works with brittle paper, it may be perfectly reasonable to proceed on the assumption that a copy with better paper is highly unlikely to be available. On the other hand, the question of reasonableness is a question of fact on which a jury or a judge might have to make a finding. The prudent course is to make an inquiry of the publisher at least where the publisher is known and readily accessible. Such efforts will not only protect the library, they will also demonstrate a good faith intention to comply with the statute.

Sections 108(b) and 108(c) have been discussed at length here because they are the central provisions in the Copyright Act relating to preservation copying. In reality, however, the whole preservation effort may not be a significant factor in publisher economics. In categorizing all the various exemptions provided in the statute, Seltzer includes both preservation sections in a small group that he says are "essentially not part of the usual commodity-market mechanism", "thus having minimal impact on copyright-scheme economics".[136] This is an important point, one that argues strongly that preservation copying has so little impact on publisher economics

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[133] But see nt. 130 *supra*.

[134] Actually, the wording of the statute is somewhat ambiguous as to which library must hold the work. It is logical, of course, that it be held by the supplying library, and the House Report makes it explicit. See H. Rep. 94-1476 at 75.

[135] Seltzer, *supra* nt. 102 at 53.

[136] Seltzer, *supra*, nt. 102 at 71. S.a. tables of exemptions and exclusion from copyright at 66.

that it ought to be allowed to proceed unhindered. If this is true, then it seems highly desirable to clarify the situation through a statutory amendment. Yet the Register of Copyright, in his 1983 report, refused to take the lead, urging that librarians work with the publishing community to develop a joint proposal for such an amendment:

> The Copyright Office is not prepared to support a broad new privilege allowing libraries largely unrestrained preservation copying rights with respect to published works, and permitting storage in machine-readable, computer-accessed systems. . . . However, the Office also recognizes that libraries should be able to employ new preservation techniques, provided adequate copyright controls are legislated, both with respect to the preservation copying and information supplying functions of libraries. We recommend a thorough review of these issues by the library, user, author, and publishing communities with a view to developing a common legislative position.[137]

Some possible ideas for such an amendment, or at least for opening the discussion with publisher representatives, are suggested below.

Despite the importance of sections 108(b) and (c) to the preservation program, overarching all of 108 is section 108(g), which limits the amount and kind of copying permitted to libraries under the other subsections of 108. In addition, section 108 does not eliminate the possibility of fair use under section 107. The relationship between copying under the 108 exemptions and fair use is an extremely difficult area, one over which there has been considerable debate and little agreement. Regrettably, there is not a clear answer, although it must be said that 108 appears to create some difficulties that may not be solved by 107. Section 108(g) provides:

> The rights of reproduction and distribution under this section extend to the isolated and unrelated reproduction or distribution of a single copy or phonorecord of the same material on separate occasions, but do not extend to cases where the library or archives, or its employee
>
> (1) is aware or has substantial reason to believe that it is engaging in the related or concerted reproduction or distribution of multiple copies of the same material, whether made on one occasion or over a period of time, and whether intended for aggregate use by one or more individuals or for separate use by the individual members of a group; or
>
> (2) engages in the systematic reproduction or distribution of single or multiple copies or phonorecords of material described in subsection (d): *Provided*, That nothing in this clause prevents a library or archives from participating in interlibrary arrangements that do not have, as their purpose or effect, that the library or archives receiving such copies or phonorecords for distribution does so in such aggregate quantities as to substitute for a subscription to or purchase of such work.

All copying under section 108 is limited to one copy at a time. That limitation is stated explicitly in subsections (a) and (g), and by implication in the other sections that permit the making of "a copy." Moreover, all of this copying must be a result of unrelated transactions, and the library may not, under this section, knowingly engage in the "related or concerted" reproduction of multiple copies of a work. For individual articles or a contribution to a collection, or a small part of a longer copyrighted work, there is a further limitation that such copying may not be "systematic," but "systematic" does not preclude permitted interlibrary arrangements.

"Related or concerted" is not defined in the statute, but the Senate Report explains, by way of example, that on this basis a library would not be permitted to make copies of copyrighted material for each member of a class with a particular reading assignment.[138] In such a situation, the library would clearly know that it was making multiple copies and the activity would undoubtedly be "related."

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[137] 1983 Report of the Register of Copyright, *supra* nt. 3 at 340.
[138] S.Rept. 94-473 at 70 (1975).

"Systematic" is also undefined in the statute. The Register's Report suggests that it basically means that there is a "system" and that "the mere existence of the system is enough to render all copying done via that system infringing, unless authorized. . . ."[139] The committees seemed to mean something more than the mere existence of a system because they did not attempt such a definition but explained the term by example in the Committee Report: (1) one library agrees to maintain a certain title and supply it to other libraries, thereby causing the others to cancel their subscriptions; (2) a research center or office subscribes to one or two copies of a title and provides photocopies of material to individual researchers instead of subscribing to additional copies; (3) one branch library of a system maintains the only subscription to a title and supplies copies of material to the other branches.[140] The Committee explains that

> Systematic reproduction or distribution occurs when a library makes copies of such materials available to other libraries or to groups of users under formal or informal arrangements whose purpose or effect is to have the reproducing library serve as their source of such material. Such systematic reproduction and distribution, as distinguished from isolated and unrelated reproduction or distribution, may substitute the copies reproduced by the source library for subscriptions or reprints or other copies which the receiving libraries or users might otherwise have purchased for themselves. . . .[141]

This language illustrates what is undoubtedly the key concern underlying the limits established in (g) for the rest of section 108—interference with a publisher's subscription base or its reasonably anticipated income stream from royalties (*e.g.*, from reprints for classroom distribution). Note that this is very similar to Seltzer's formulation of the fair use doctrine as not interfering with the publisher's "reasonably anticipated economic reward." It is also similar to the analysis of fair use that suggests that the most important of the four factors is the one dealing with the effect of the use on the potential market for the work.

If this is correct—that the factors underlying the section 108 limitations are the reasonable economic expectations of the copyright owner—then it is fair to inquire further about what those expectations would be in the preservation context. For the older materials being preserved under the brittle books program, it seems likely that the publisher has little expectation of further economic reward. This is especially true for those libraries that already hold the title and are merely replacing a set that is deteriorating. Somewhat more troublesome is the case of a library that did not already have a work, but nonetheless decided to purchase it from a library participating in the brittle books program. Under that circumstance—a new purchaser—the publisher might expect some modest compensation. But such cases are likely to be few in number and, as a result, the appropriate compensation is likely to be *de minimus*.

The author of this paper believes that the above analysis provides a useful approach to understanding what 108 is all about. Regrettably, the 1983 Report of the Register of Copyright does not follow such an approach and seriously muddies the water by overstating his belief that librarians do not understand the section and have applied it to permit copying far beyond what was intended, causing publishers to "forego" some $38.6 million in revenue annually.[142]

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[139] Many managers would quickly respond that such a narrow reading is not helpful, since in any operation that occurs regularly in any business, there must be a routine or systematic way in which the task gets done. To conclude that merely because a library has made a task more routine or efficient it has also made it illegal is to make this section appear to be absurd.

[140] S.Rept. nt. 137, *supra*, at 122.

[141] *Id.*

[142] See generally *1983 Report of the Register of Copyrights* 138-44. See especially, statistics on 142-3.

First, the Register expresses great concern that the discussion about 108(g)(2) has centered on interlibrary loan, and says that such an approach is "letting the proviso tail wag the systematic dog." It is true that with the exception of the proviso, section 108 is worded generally. But the focus on interlibrary loan (ILL) is perfectly understandable since one of the fears of the library community was that, without the proviso, the bar on systematic copying could be used to curtail interlibrary cooperation.

Then, trying to emphasize the point that (g)(2) is not limited to interlibrary transactions (a correct point), but in a tone that seems intended to lecture the library community, the Register mis-states the law himself three times in a way that could lead to potentially erroneous conclusions. At various points, the Register states: "*all* 'systematic' photocopying is forbidden *except* such ILL photocopying as the proviso permits . . . [Emphasis in original.]"[143]; "all 'systematic' copying is against the law except the 'non-substitutional' ILL copying permitted by the proviso"[144]; "the 'quantitative substitution' language in the proviso to (g)(2) applies *only* to interlibrary arrangements—all other 'systematic' photocopying is forbidden—without regard to quantities . . . [Emphasis in original.]"[145] Such absolute statements are plainly incorrect.

By the explicit terms of the section, the systematic copying provisions do not apply to all copying; they only apply to the copying of certain works described in another section, *i.e.*, an "article or other contribution to a copyrighted collection or periodical issue, or to a copy of a phonorecord or a small part of any other copyrighted work," as provided in section (d). This limitation is made explicit by both Committee reports.[146] Importantly for the brittle books program, because of that language, the "systematic" language does not seem to apply to complete works copied for preservation purposes under sections 108(b) and (c) or to complete out-of-print works copied for a user under 108(e). Of course, it could be argued that if the limitation applies to articles or small parts of works it should also apply to a complete journal or to an entire work. But, since the purposes of the preservation sections are quite different from those of the other sections—necessitating the copying of complete works—it seems entirely reasonable to assume that Congress meant what it said in establishing the "no systematic copying rule" only for articles and portions of other works. No doubt, Congress realized the necessity of treating differently those materials that can be legitimately copied in their entirety, *i.e.*, works being preserved under 108(b) and (c).

With all this in mind, subsection 108(g)(2) is not likely to apply to the immediate work of the brittle books program.[147] However, (g)(1) and the opening paragraph of 108 will apply if multiple copies of protected material are made for distribution to other libraries. Thus, while libraries may be able to develop a relatively formal system for copying, they will still be limited to one copy at a time and there may not be any related or concerted reproduction or distribution of multiple copies.

The author of this paper believes that the best way to understand section 108(g) is to follow the analysis suggested by the Senate Committee—to consider whether the copying is of such a nature or in such quantities as to substitute for a purchase or otherwise interfere with the reasonably anticipated income stream to the publisher. The author further believes that the anticipated income stream from preserving out-of-print brittle works is small and that the brittle books program participants will be able to proceed easily or work well with publishers to obtain permission to copy.

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[143] Report of the Register at 138.
[144] *Id.*
[145] *Id.* at 140.
[146] S.Rept.94-473 at 70 (1975) and H.Rept 94-1476 at 76 (1976).
[147] If, however, in the future, libraries begin to use their publications file to distribute individual works to libraries or readers, they will be subject to this provision.

Regardless of the applicability of 108, the relationship between the 108 exemptions and fair use is another difficult issue, one which has also generated animosity and controversy. The 1983 Report of the Register of Copyrights discussed the issue at length, but did not completely dispose of it. Although both sides insist that theirs is the correct way to interpret the statute, this author believes that at the polar positions neither side is completely right, and that there remains a serious dispute.

The publishing community asserts that Section 108 sets out the libraries' rights, and therefore creates a cap on library copying.

> . . . whether or not section 108 rights are . . . intended as a restatement or a clarification of library copying rights or whether they are, as we think, additional property rights, the converse cannot be true. Section 107 rights cannot for all practical purposes exceed those granted by section 108.[148]

The library community, relying on Section 108(f)[149], understands that it has been given certain rights under 108, but also believes that section 107 may be applicable in certain cases. It is clear, however, that the sections are separate, and that this provision cannot be used, as the Register says "to read section 108 out of the statute."[150]

The Register sets up the issue as "whether a librarian who has made all of the photocopies permitted by section 108 in a given type of transaction may thereafter make one or more additional photocopies under the fair use provisions of section 107 or whether such copying is infringing unless authorized by the copyright owner."[151] Although the Register correctly answers that question by saying "it depends," he nonetheless seems to strike the balance very close to the publisher's position, in a way that is likely to restrict library copying. The Register says, for example, that only "[o]n certain infrequent occasions, such copying may be permitted."[152] He then goes on to define a two-part test for the permissibility of "post 108" copying:

> Library photocopying "beyond" 108 may be fair use if *both*:
>
> (a) the transaction is of a *type* which could be fair use in the absence of section 108, *and*
>
> (b) the fair use analysis (conducted only if (a) applies) of *this* transaction takes into account the "108" copying which has already occurred. [Emphasis in original.][153]

Using this test, the Register then goes on to exclude all interlibrary photocopying from the analysis by saying it does not meet the first prong of the test because it is not of a type that could be fair use in the absence of section 108. (Fortunately, he does indicate that preservation copying would be likely to be fair use even without section 108.) The author believes that the Register has gone too far in excluding all ILL photocopying from fair use. Whether or not one agrees with the result in *Williams and Wilkins*, at the very least that case demonstrates the difficulty of reaching such a conclusion. Before the Act was passed, there was great uncertainty about the applicability of fair use to photocopying. In enacting into statute the state of fair use as it existed at the time, Congress preserved the uncertainty, and the Register's attempts to cut off that discussion seem inappropriate.

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148 Statement of Charles Lieb, representing the AAP, quoted in the 1983 Report of the Register of Copyrights at 95.
149 (f) Nothing in this section—
(4) in any way affects the right of fair use as provided by section 107 . . .
150 *Id.* at 98. Actually, the publishers' position appears to read 108(f)(4) out of the statute.
151 *Id.* at 95.
152 *Id.* at 96.
153 *Id.* at 98.

It may be that, as a matter of fact, copying beyond section 108 will, indeed, be infrequent. If the section was well-crafted, then it will cover most library copying and set some reasonable limits upon it. If, however, certain needs were overlooked, fair use provides a possible escape valve. To conclude that recourse to fair use should be discouraged as a matter of law is to distort the balance that was carefully built into the statute.

It may be that how one approaches the question of the relationship between the two sections depends to a large degree on how one views the purposes of section 108. The Register says that section 108 was needed to make lawful what would have otherwise been unlawful, a view that presumes the outcome of the legal debate. The author's view is that section 108 was designed to provide some certainty in an area where the state of the prior law was highly uncertain and where the technology was changing very rapidly. It was intended, as was said before, to create a safe haven for limited library copying. Beyond the limits, of course, libraries go back into uncertain territory where they must argue fair use.[154] Arguing fair use, however, does not mean a court will find fair use. Section 107, as now incorporated in the statute, should remain an equitable rule of reason in which a variety of circumstances (including, as suggested by the Register, any prior 108 copying) are considered.

3. Compulsory and Voluntary Licenses[155]

Compulsory licenses do not currently affect regular library operations or the brittle books preservation program. However, they have been used to solve difficult problems in other areas of copyright and they are widely used in other countries. Such a mechanism may not be needed for basic preservation work, but it might provide a useful legal solution to allow the preservation program to develop the wider electronic distribution ultimately envisioned.[156]

Compulsory licenses provide a mechanism for compensation to creators in situations where control of copies or control over use is difficult. Essentially, the compulsory license statutorily grants blanket permission to use a particular kind of work in a way that would otherwise violate one of the exclusive rights of the creator in return for payment of a fee to a central agency. The royalties thus collected form a pool of funds from which compensation is provided to creators participating in the system.

Under United States law, compulsory licenses began with a license for the reproduction of copyrighted music. The case of *White-Smith Music Publishing Co.* v. *Apollo Co.*, 209 U.S. 1 (1908) found that piano rolls were not copies of copyrighted music, but part of a machine that played the musical works. In response to this case, in the Copyright Act of 1909 Congress established a provision to allow any manufacturer of recordings or mechanical reproductions to use a musical composition that had previously been recorded provided the manufacturer paid a royalty to the copyright owner. This scheme has been administered by ASCAP and BMI, which collect and distribute the statutory royalty (2 cents per disk until 1976, 2 ¾ cents per disk or ½ cent per minute, whichever is larger, after 1976). Under the 1909 Act, once the copyright owner had licensed the first recording, subsequent recordings of the same musical composition could be made by paying a royalty. With a few changes, this basic scheme for sound recordings was carried forward into the Copyright Act of 1976.[157] The 1976 Act also added compulsory licenses for jukeboxes,[158] public broadcasting,[159] and cable television.[160]

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[154] See Latman's Copyright Law, 6th ed., by William S. Patry 254 (1986), in which he refers to this argument as controversial, citing the Report of the Register.

[155] Portions of this section are taken from the author's background paper for the March 1988 meeting of the Network Advisory Committee of the Library of Congress on "Intellectual Property Issues and Information Networks", published in Network Planning Paper No. 17 by the Library of Congress (1989).

[156] See generally Hyman, "The Socialization of Copyright: The Increased Use of Compulsory Licenses", 4 Cardoza Arts & Entertainment Law Journal 105 (1985).

[157] See 17 U.S.C. Sec. 115 (1982).

[158] 17 U.S.C. Sec. 116 (1982).

[159] 17 U.S.C. Sec. 118 (1982).

[160] 17 U.S.C. Sec. 111 (1982).

In each case, the statute provides for a mechanism to collect royalty payments that will provide a pool of funds for distribution to copyright holders. In the case of cable television, the rates are established as a percentage of the gross receipts of the company; for jukeboxes, an annual fee is paid for each machine; for making and distributing phonorecords, a fee for each disk is levied for each work on the disk; and for public broadcasting, fees are collected for each performance of a covered work.[161] The fees for cable television and jukebox royalties are collected by the Register of Copyrights and distributed by the Copyright Royalty Tribunal (CRT). The Copyright Royalty Tribunal also sets or reviews the rates for cable television, for phonorecords and coin-operated phonorecord players, and for non-commercial broadcasting. In setting the rates for phonorecords and jukeboxes, the CRT is specifically directed to balance several potentially competing objectives.[162]

Because of the relative success of compulsory licenses, similar systems have been established on a voluntary basis in other parts of the information industry. For example, the Copyright Clearance Center (CCC) has been established to provide a clearinghouse for the copying of journals beyond what is permitted under the statute. Originally, payment to the CCC was made on a per copy basis, and royalties were distributed accordingly. In recent years, the CCC has developed an annual license program for its major corporate users. In that program, payments are based on industry surveys and sophisticated econometric modeling. Similarly, for the non-theatrical institutional market[163], the Motion Picture Licensing Corporation (MPLC) has been established to provide a mechanism for the collection of royalties and payment to owners for the institutional showing of home video cassettes and videodiscs. In most cases, the MPLC is negotiating a blanket agreement with each participating institution. The existence of voluntary licensing groups suggests that the industry sees them as a viable way to provide compensation to creators for the use of their work. However, without the clear force of law behind them, participation has been limited.

4. Software

Other than Section 108, the only place in the Act where copying of a protected work is permitted for preservation purposes is in Section 117, covering software. There, the Act specifically provides that the owner[164] of a computer program may make or authorize the making of another copy or adaptation of that computer program provided:

> (2) that such new copy or adaptation is for archival purposes only and that all archival copies are destroyed in the event that continued possession of the computer program should cease to be lawful.

The purpose of this section (along with the other half of 117, permitting copying that is an essential step in using the program) is to allow the owner to make such copies as are needed for the program to be used.[165] This obviously includes loading (copying) the program into memory but does not include the making of multiple copies, the use of the copies on more than one machine simultaneously, or the making of copies for sale or lending to others. Copying for archival purposes allows the owner to make copies where the original might be damaged due to the fragility of the storage medium or mechanical or electrical failure. It does not allow the copying of ROM cartridges, but may permit the copying of more fragile media, such as floppy disks. In construing this section the U.S. District Court for the Northern District of Illinois said:

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[161] See generally 37 C.F.R. Sec. 303-308 (July 1, 1989).

[162] Included in those objectives are: (1) to maximize theavailability of creative works to the public; (2) to provide the copyright owner a fair return on his work; (3) to reflect the relative roles of the copyright owner and the copyright user; and (4) to minimize any disruptive impact on the industry. (See 17 U.S.C. Sec. 801 (b)(1) (1982).

[163] *E.g.*, nursing homes and libraries where there is a limited audience and their viewing is incidental to their use of the institution.

[164] The use of the word "owner" in the statute is significant. CONTU had recommended that the privilege be granted to "licensees", but Congress chose to extend it only to owners. Many software programs purport, through the use of "shrink wrap licenses", to convey only a license to use the software, rather than an ownership in the copy. The validity of such licenses is highly questionable and has even been outlawed in some states. If valid, however, such licenses would preclude a lawful purchaser from making copies under this section.

[165] See Final Report of the Commission on New Technological Uses of Copyrighted Works at 13.

> Congress did not enact a general rule that making back-up copies of copyrighted works would not infringe. Rather, according to the CONTU report, it limited its exception to computer programs which are subject to 'destruction or damage by mechanical or electrical failure.' Some media must be especially susceptible to this danger. JS&A has simply offered no evidence that a ROM chip is such a medium.[166]

Section 117 is not, of course, immediately applicable to brittle books. However, it does again show Congressional sensitivity to the problem of preserving fragile material, in this case in the context of an individual owner rather than a library owner.

III. REPRISE—APPLYING THE ACT TO THE BRITTLE BOOKS PRESERVATION PROGRAM

This section will summarize and restate where the brittle books preservation program can proceed with relative certainty, and where there might be some uncertainty under the law.

A. Safe Copying—Materials in the Public Domain

There is a vast body of published material on which all the elements of the brittle books program can proceed, including preservation copying, making multiple copies for distribution to other libraries, and even building an electronic datafile. Materials which are in the public domain are not protected by copyright, and libraries are free to copy, distribute, or display them. They may also develop new value-added products or services such as computer-produced digests or indexes, thereby providing new means of access to historical materials.

Among the materials thus available are all materials published prior to 1915. This date moves up each year, and by the end of the twenty-year preservation project, all materials published prior to the middle 1930's will be in the public domain. In addition, materials published without the statutory notice requirement are also in the public domain. Although libraries are likely to find that most of the major publishers complied with the notice requirement, some periodicals, newspapers, and small presses may not have done so. Finally, all United States government publications, unless they contain separately protected works, are in the public domain.

Another important category of unprotected materials are those for which copyright was not renewed. All materials published prior to January 1, 1950 should have had their copyright renewed before 1978, and there should be a record of that renewal in the Copyright Office. If they were renewed, copyright protection is extended to seventy-five years from the date copyright was originally secured. If they did not, the works are in the public domain. Statistics from the Copyright Office show that only 9.5 percent[167] of existing copyrights were renewed under the old system, with the majority of works lapsing into the public domain at the end of their first term. This fact suggests that the majority of materials published prior to 1950 are no longer protected by copyright. Therefore, 1950[168] may be a convenient cutoff date from which much (but not all) of the work could be accomplished, without the necessity of statutory amendments. Participating libraries

166 *Atari, Inc.* v. *JSA, Inc.*, 597 F.Supp 5, 9-10.

167 See nt. 76, *supra*.

168 Conveniently, some (including NEH) have already adopted pre-1950 materials as the target group. Of course, some would like to convert much more recent materials and these comments obviously do not apply to them.

of the program would, of course, still need to conduct their research at the Copyright Office to determine which of such works are protected and which are not. For those which are not, the full program may safely proceed. Those which were renewed, however, are still protected and are subject to all the comments in this paper about protected works.

B. Protected Works—The First Copy

Protected works are subject to the full range of exclusive rights and the limitations on those rights granted by the Act. Since the right to make or authorize the making of copies is one of the exclusive rights of the owner, any copying must come under some provision of the Act that authorizes the copy. For the first copy, this is not difficult, although even here the law is somewhat ambiguous.

Section 108 grants *libraries*—not some other entity—the right to make preservation copies under certain circumstances. In general, it appears that participating libraries may make single copies of actually deteriorating published works (*i.e.*, not new works in anticipation of future deterioration) for replacement purposes. Under the current law, such copying should be in analog—not digital—format and the library should make a reasonable effort to determine whether or not an unused copy is available. Since other old copies are also likely to be deteriorated, such an effort may consist simply of checking with the publisher or in sources of reprint information to see if the work has been reprinted and is currently available.

The biggest stumbling block is likely to be the prohibition on "systematic copying" provided in section 108 (g). The Register and others have read that section as prohibiting *all* systematic copying, and have defined systematic as any program where there is a "system" involved.[169] By this definition, any copying activity that is organized or routine and not random and isolated is problematic. This would appear to rule out all copying done as part of an organized program. As shown earlier, however, the author of this paper believes that the Register has erred in defining systematic copying as broadly he has and in applying it to all copying, including preservation copying. The Congressional Committee's clear concern was with copying that allowed libraries to substitute the copy for a purchase; rarely is that the case with preservation copying. Moreover, the terms of the section do not even seem to apply to the copying of complete works under the preservation sections. As a result, although there is a serious conflict on this point, this author believes that preservation copying (at least the first copy clearly permitted under the statute) is not subject to the prohibition on systematic copying.[170]

Even if section 108 were unavailable for some reason, fair use might still be used to permit preservation copying. By its nature, however, what constitutes fair use is often uncertain. Each case calls for an application of particular facts to the four-part standard, including (1) the purpose and character of the use; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used; and (4) the effect of the use on the publisher's potential market.

Despite the need for such an analysis, most preservation copying would probably meet the test. Virtually everyone views preservation copying as socially beneficial. It is consistent with the Constitutional purposes for copyright since the preservation of printed knowledge is necessary for the progress of science and the useful arts. Even publishers and individual copyright owners are likely to support such copying (as long as it does not interfere with sales) since it keeps their works on the shelves of libraries and in use by researchers.

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[169] But see discussion at note 144 *et seq.*

[170] This point is reinforced by section 108(h) which evidences a statutory intent to permit greater latitude to preservation copying than other forms of copying. There, all the copying permitted under 108 generally is denied for the copying of films, audio-visual works, etc. However, the copying of such works for preservation purposes under 108(b) and (c) is expressly permitted.

The nature of the work might be a factor, but in many different places in the Act and its legislative history, Congress signaled an intent to allow broad preservation copying on a wide range of materials, including not just books, but also films and other copyrighted materials. Moreover, the economic impact of making of a single copy of an out-of-print work for use in a library is *de minimus*. If publishers really thought there was a significant market for sales of such works, they probably would have reprinted them. Thus, only the third factor, the proportion of a work that is copied, is likely to weigh against the copying under fair use.

Seltzer again focuses attention on the basic issue when he states that preservation copying is "essentially not part of the usual commodity-market mechanism," and thus has "minimal impact on copyright-scheme economics."[171] Under his formulation of the fair use doctrine, it is even clearer why such copying should be fair use since preservation copying furthers the progress of knowledge, literature and the arts and does not deprive the publisher of an appropriately expected economic reward.

Further support for the idea that preservation copying would be "fair use" is found both in the legislative history of the Act and in the 1983 Report of the Register of Copyrights. In the context of film preservation, the Senate Committee Report said:

> "A problem of particular urgency is that of preserving for posterity prints of motion pictures made before 1942. . . . [T]hose that remain are in immediate danger of disintegration; they were printed on film stock with a nitrate base that will inevitably decompose in time. The efforts of the Library of Congress, the American Film Institute, and other organizations to rescue and preserve this irreplaceable contribution to our cultural life are to be applauded, and the making of duplicate copies for purposes of archival preservation certainly falls within the scope of 'fair use'."[172]

Although the life of a film is substantially shorter than that of a book, the parallel between the brittle books program and the situation described in the Senate Report is striking. It suggests that as the full magnitude of the brittle books problem becomes known, both fair use and section 108 may be used to justify such copying as may be necessary to preserve our heritage.

Finally, even the Register of Copyright seems to have agreed that preservation copying can be fair use. In his discussion of copying beyond section 108, the Register states:

> ". . . one would likely conclude that the replacement of a lost, stolen, damaged, or deteriorating copy could be a fair use, while all ILL copying, a form of systematic copying lawful only via the proviso, could not be a fair use."[173]

C. Protected Works—Multiple Copies for Other Libraries, for Sale, or for Conversion and Distribution in Digital Formats

Conceptually, the questions are more difficult after the initial preservation copy has been made. When libraries consider making or selling multiple copies, or loading the documents into an online file for electronic distribution to other libraries or end users, they have moved into more uncertain territory. Some of these activities may be permitted; some seem unlikely to be permitted under the current Act. In all such cases, however, the situation is ambiguous and the library and archives community might wish to seek a statutory clarification or find other protection before proceeding.

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171 Seltzer, nt. 102, *supra*, at 71. Seltzer does point out at 72 that without the express exemption in 108, preservation copying would put the notion of fair use at some strain.

172 S.Rept. 94-473, *supra* nt. 137 at 66 (1975).

173 1983 Report of the Register of Copyright, nt. 3, at 98.

1. Copies for Other Libraries

Section 108 permits a library to make a replacement copy of a published work for itself. It also permits a library to make a copy of an unpublished work for deposit in another library. It does not explicitly permit a library to make a replacement copy of a published work for another library, and copies of unpublished works may be deposited in other libraries only "for research use", not for general development of the collection. For obvious reasons, libraries want to use the master copies of materials to make them available to other interested libraries. Although such a program is problematic under the statute, some such copying may be permissible, some may not be.

Systematic copying aside, Section 108 only permits the making of a single copy of a work.[174] But the magnitude of the preservation problem is such that no library can realistically convert everything, and it is highly desirable for one library to make a master and then supply copies to other libraries needing the same work. On the face of it, such activity does not appear to come under section 108(c) since that section does not include a distribution right. However, if the second library already holds the item in the collection, it would be entitled to make its own copy. Can it delegate that privilege to another library to act as its agent to make a copy of the work from an existing master? Such activity seems beyond the literal wording of 108, both because another library is involved and because it may naturally lead the library holding the master to make multiple copies. Nonetheless, it does not stretch the spirit of the law too far to argue that such copying should be permissible. The key elements of the section are undoubtedly the fact that the original is deteriorating and that the copy will replace[175] an existing copy from which the publisher has already received a royalty. Limiting a library to doing its own preservation copying from its own collection is a built-in constraint against large-scale preservation copying that could cripple a coordinated national program. This is an area where the program might be on safer ground if an amendment to the Act were sought to explicitly permit libraries to engage in cooperative preservation programs.[176]

In the case of libraries that did not own the work in the first place, it is harder to make the case that the copying is for preservation purposes unless one library is withdrawing its copy in order to allow another to house the preservation copy. In the ordinary case of a library using the master microfilm to acquire new materials for its collection, it seems reasonably clear that under the Act the copyright owner is entitled to compensation for the copying of the work. It would be a copy of a complete work to be used in exactly the same manner as the original. It does not appear to fall under any of the library exemptions and it would be hard to make the case for fair use since the sale of new materials to libraries is a fundamental part of the market for any publisher. Absent a statutory amendment, it appears to this writer that the line must be drawn here, and that if libraries begin to make copies of preserved works available in this way, they will also need to be prepared to negotiate and pay appropriate royalties to copyright owners.

By extension, the same might be thought to be true about making such works available to individuals. However, in isolated cases (*i.e.*, not related or concerted), a library may make a copy of a complete work for a user under the interlibrary provision of 108(e). That section requires that the copy become the property of the user for private research or scholarship and that the library taking the user's request display the appropriate copyright warnings.

2. Converting the Material into Electronic Format

Conversion of materials into electronic formats under the authority of the preservation sections is also clearly beyond the intention of the drafters. Nonetheless, it may not be beyond the spirit

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[174] See discussion of 108(g) *supra*.

[175] If not immediately, at least in the near term.

[176] See *infra* for some specific statutory language offered for consideration.

of the section if the conversion could be carefully confined to such preservation copying as would otherwise be permitted. This could occur, for instance, by converting materials to CD-ROM instead of microfilm for storage but not enhancing the product digitally and not distributing it electronically. Such a limited conversion would not take full advantage of the digital format; it would simply permit more compact storage. In effect, it would be just a more compact version of the microform. In such a case, the limitation to "facsimile form" makes the law seem fundamentally anachronistic. The real issue is not digital versus analog; the real issue is, as always, subsequent distribution of multiple copies and keeping those copies under control. Despite this argument, the law as written limits the conversion to analog formats, and conversion to electronic form seems clearly proscribed.

3. Distribution of Copies Electronically

If the mere conversion and storage of materials electronically is not permitted, then *a fortiori* the electronic dissemination of protected materials is also problematic. In fact, however, but for the display right granted under 106, the electronic transmission of individual protected works could easily be governed by other parts of the act—fair use, interlibrary copying of individual works, etc. Indeed, the arguments of the *Sony* case could be easily extended to such a situation. Instead of time-shifting, for library materials the need might be for location shifting. For example, suppose the only copy of a 1963 medical journal needed by a physician in Oregon for research purposes was held by the National Library of Medicine in Bethesda, Maryland. From the point of view of the physician, if that material were transmitted electronically and read with no permanent copies being made,[177] there is little difference in circumstances from the *Sony* case, and a court might find fair use. If, however, researchers used such arrangements to create their own paper or disk-based libraries then the copying would clearly be beyond what is permitted under *Sony*.

The difference, of course, is that the television station was lawfully broadcasting a movie or other program that was in the public domain or for which it had paid an appropriate royalty. Because of the language and legislative history of Sections 106 and 108, it appears to this writer that the construction of an online file of protected works and subsequently transmitting those works electronically to libraries or individual users is beyond what the act contemplates. If the brittle books program wishes to pursue this activity with works that are still protected, it would be wise to seek the permission of the individual publishers or to push for the development of a voluntary or compulsory licensing[178] mechanism to provide appropriate royalties to claimants.

IV. WHAT HAVE OTHER ORGANIZATIONS DONE ABOUT COPYRIGHT?

A. Library of Congress

The Library of Congress has several programs under way for the conversion of materials from one format to another. The author discussed with library staff their microfilm-based preservation project and the American Memory Project.

The microfilm preservation project has similar objectives to those of the cooperative brittle books program. It began in 1969, and identifies materials in the collection that have deteriorated to the point where they need to be filmed or otherwise preserved in order to keep them in service. In general, when the book can no longer be made serviceable through rebinding, it is a candidate

[177] Or, if disk or paper copies are made, the copies were destroyed after reading, as in *Sony*.
[178] See *infra*.

for filming. Once the materials are identified and prepared for preservation filming, they are sent to the library's photoduplication department which produces the camera negative and a use copy for the collection. Between 1968 and 1989, the library filmed some 128 million pages, and it is currently filming about 6 million pages per year.

Much of the material copied under this program was published before 1915, but some is more recent. Nonetheless, since all materials are being filmed for the purpose of replacing deteriorated items in the collection, the library's activities come within the copying permitted under Section 108 of the Act. The only relatively current materials being filmed are those in the public domain.

When the microfilming project began, the library endeavored to conduct an exhaustive search of the records of the Copyright Office and to seek permission of the copyright owner wherever they could identify one. The library found that effort to be seriously problematic, however, particularly with respect to serial publications. They found—in reality—all the same problems that the brittle books program has been concerned about in theory. Checking the records was very time consuming and far from reliable. Serials change title and each of those titles needs to be checked. Serials change ownership, and as noted above, there is no requirement that a change of ownership needs to be filed with the Copyright Office. Individual issues of serials may be separately copyrighted and permission needs to be granted for each of them. Finally, individual authors may retain the rights to individual articles within a journal. As a result of these problems, the Library of Congress stopped seeking permissions about eight years ago. On the advice of counsel, they now rely on Section 108 for their copying under this program.[179]

The American Memory Project has begun to capture in videodisc or CD-ROM format complete archives documenting American history and culture. In the future, this program is expected to evolve into an online service. The first prototype collections consist of photographs and political cartoons. They will soon expand to include European folk music recorded in California in the 1930's, sound recordings from the "Nation's Forum" of political speeches and orations, life history manuscripts created in a WPA Writers Project, very early motion picture copyright deposits, African-American pamphlets from the 1860's to 1920, and California local histories, among other collections.

The American Memory prototype collections are all images, consisting of some 25,000 photographs and 530 editorial cartoons, most of which are in the public domain. Where the material is protected by copyright, the Library of Congress identified the copyright owner and received permission to load the item into the datafile. When they could not get permission, they did not use the item. It should be noted that at this preliminary stage, the Library of Congress sought and was given only very limited permission for the use of the material in a demonstration project and for the development of the prototype. The explicit agreement was that when the system becomes permanent, a further long-term agreement would be negotiated.

In an approach now under discussion at the library, the next phase of the American Memory Project will continue the library's traditional practice of seeking permission from the apparent owners of copyrighted works, whenever feasible. Some of these works are sound recordings. Sound recordings were not copyrightable under the Federal Copyright Act until 1972 and are not protected, although the underlying work, which might have been published in print form, might be. The library proposes to seek permission for the use of folk music that seems "likely" to specialists to have been protected or for which copyright records show registrations and/or renewals. To avoid a potentially large administrative burden, the library is "disinclined" to seek individual permissions for the speeches since many of them were by Federal officials and could not be copyrighted and there seems little likelihood that the heirs of those who were not public officials would have renewed the copyright and would now object to the inclusion of a speech in this project.

[179] Conversations with Tamara Swora, March 29 and April 1, 1990.

Both of these new American Memory programs will be converted to electronic form from existing compilations. Since a compilation might be copyrighted, even where the original work was not, the library will seek permission from the current owners of the compilation.[180]

B. Research Libraries Group[181]

The Research Libraries Group (RLG) has coordinated several preservation projects over the last few years. It has received over $6 million to fund cooperative projects from the National Endowment for the Humanities, the Andrew W. Mellon Foundation, and other granting agencies. Through those projects, at least twenty different institutions have received support for their preservation efforts. In the first cooperative project, finished in 1987, 30,000 volumes were copied. In the second project, about 15,000 more volumes were copied. Two projects under way now will result in an additional 52,000 volumes being filmed. Beginning in May 1990 a program for the preservation of some archival collections will begin.

The RLG projects are all film oriented. For each work filmed three copies are made. One is the master and is deposited in a vault, to be used only in the event that no other copy is available. The second is a duplicate of the first and is kept at the library for purposes of making additional copies. The third is a use copy and is available in the library for general research and use.

For RLG-coordinated projects, RLG has developed some copyright guidelines but, in the end, it is up to each individual institution to decide what it is going to do. The RLG guidelines advise libraries that they should not copy publications published after 1915 unless they have first ascertained that the material is either in the public domain or they have acquired permission to make the copy. In addition, libraries are advised not to copy for other libraries or individuals unless (1) the material is in the public domain, or (2) the other library indicates that it has complied with the requirements of the Act (either investigated or obtained permission), or (3) the copy is for an individual and compliance under the interlibrary loan provisions of the Act is indicated appropriately.

In practice, in individual libraries, copying under the preservation program is merged internally with other copying projects, and libraries usually rely on guidance (or the lack thereof) from their own counsel. In most cases, for interlibrary borrowing for a user, the standard 108 certification is required. If copying is requested from one library to another for preservation or collection purposes, the copying is likely to be made "copyright permitting".

C. National Library of Medicine

The National Library of Medicine (NLM) began a major preservation project in 1986. Although it hopes to convert materials to electronic form eventually, it has begun its work by converting deteriorated materials to film. It made that decision both for reasons of economics and because more is known about film as a preservation medium.

Since NLM began its project, it has copied 23,000 volumes. According to NLM's National Preservation Plan,[182] it expects to copy 35,000 pages and 100,000 volumes in a very short period of time. NLM expects to make copies of these films available to other libraries which need them for preservation purposes. Whether or not they will make them available to libraries that never had the title before will turn, in some measure, on the copyright implications of such a decision.

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[180] Library of Congress, draft policy. Internal memo dated March 9, 1990.
[181] Conversation with Patricia McClung, March 4, 1990.
[182] National Preservation Plan for the Biomedical Literature, (Mimeo 1988).

The National Library of Medicine reports that the vast majority of materials copied so far are in the public domain because they were published before 1914. Those which are not in the public domain have been copied under the preservation provisions of section 108(c), as discussed *supra*. Before filming, NLM tries to determine whether someone else has already filmed the work. If such a film already exists and it meets NLM technical specifications, NLM will not copy it again but will instead purchase it from that source. Since U.S. micropublishers have already filmed a high proportion of U.S. titles, NLM has found that most actual filming is for foreign imprints. With regard to locating an unused copy, as provided in Section 108(c), the National Library of Medicine believes that that is a viable option only if the work has been reprinted or has remained in print, since an old original is likely to be in essentially the same brittle condition as the one already in the library. Accordingly, if the work is not currently in print, NLM does not seek a copy in the second-hand trade but proceeds directly to filming.

In contemplation of converting preserved materials to electronic form, NLM convened a working group on compensation for intellectual property rights in the context of full-text storage and retrieval of scientific and technical information. Their Final Report was issued on September 3, 1983 and contained the following statement of principle:

> With specific reference to the National Library of Medicine and considering the archival preservation of deteriorating or damaged out-of-print materials in the context of scientific and technical information, the conversion of them to machine processible form (such as, specifically, optical disc storage in either image form or digital form) should by agreement be regarded as permissible provided the use of such forms was limited to image display on the premises of the library. Any other use—copying, transmitting to locations other than the premises of the library, or processing for purposes other than direct display—would be subject to copyright protection.[183]

This statement of principle followed some correspondence requesting the American Medical Publishers Association to agree to permit the National Library of Medicine to "transform into 'electronic' format out-of-print deteriorating volumes without seeking to determine if another paper copy is available."[184] In that letter NLM stipulated that they understood the concern about possible subsequent uses of material stored electronically and that they would "treat the electronic copy as the book and . . . [would] use it only in exactly the same way the volume might now be used until such time as subsequent arrangements may clarify the conditions of retrieval and possible dissemination."[185] In a subsequent letter, James Gallagher of the Williams and Wilkins Co. agreed to take up the issue with the Board of the Medical Publishers Association. The Association agreed to these principles at its meeting in the first week of February 1983.[186]

The legal authority of such an agreement is limited since the Association has no authority to bind its members. However, it does demonstrate good faith on the part of the library and it suggests that the publisher-members of the Board have considered the issues and shown a willingness to work with the library in the preservation effort. It also puts the Association on record as supporting this type of program.

Based on their experience, the National Library of Medicine is optimistic that publishers will work with the library community to solve the preservation problem. As a result, they believe a negotiated solution similar to the one they worked out with AMPA could also be worked out in a broader context.

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[183] Hayes, Robert M. "Final Report of the Working Group on Compensation for Intellectual Property Rights in the Context of Full-Text Storage and Retrieval of Scientific and Technical Information" p.4, National Library of Medicine, 1983.
[184] Letter from Harold Schoolman, Deputy Director for Research and Education, National Library of Medicine, dated January 31, 1983.
[185] *Id.*
[186] Reported to the author at a meeting at NLM on October 16, 1989.

D. University Microfilms

University Microfilms (UMI) is a private company that has been in the business of converting print materials to microfilm for many years. Not only does UMI film for its own commercial purposes, it also films on a contract basis with individual libraries, and it is currently engaged in such work on behalf of a number of libraries that have received preservation grants.

UMI is careful to operate within the confines of the copyright law, and always obtains the permission of the copyright holder before filming.[187] Joe Fitzsimmons, the president of the company, described their rights and permissions files as the "essence of their business"[188] since they contain contracts with over 10,000 publishers. This part of the enterprise is done with such care that for their dissertation program they actually have separate contracts with each individual author.

Because of the importance of rights and permissions to their business, UMI has developed a large and sophisticated staff to handle such matters. The staff seeks permission to copy not only for the basic microfilm operation, but also for their article reprint service and for online and CD-ROM document delivery. The staff devoted to this activity includes one vice president, two managers, three publisher representatives, four clerical staff, and ten people in the database management department.

According to Fitzsimmons in a presentation made at the Library of Congress in the spring of 1989, the royalty payment schemes are individually negotiated with each copyright owner, and the publishers' desires drive the compensation package.

Often, UMI responds to librarian requests to add a new publication. They then negotiate an agreement with the publisher that satisfies the library needs and provides the publisher with a new source of revenue at no additional cost. Typically, the resulting contracts are non-exclusive, and the royalties are based on net sales revenue for the title. Records of sales are maintained in an elaborate sales history file. Licenses for electronic distribution are similar, but they specifically give UMI a non-exclusive worldwide license to reproduce, distribute, and transmit the title in question. Again, the royalty is negotiated individually and based on net revenues.

The elaborate program developed by UMI is necessary because it operates in the commercial environment. The transaction costs are high, however, and to the extent that the brittle books program expands from narrow preservation work to the sale and distribution of protected works, it would be well advised to seek to minimize the transaction costs by the types of statutory changes noted *infra* or by working through a collective such as the Copyright Clearance Center.

V. A REVIEW OF SEVERAL POSSIBLE SOLUTIONS

A. Negotiate Agreements with Publishers

The most obvious approach is to work within the existing statutory framework and to seek permission from the various copyright owners. The tumultuous years during and immediately following the passage of the new Act were characterized by uncertainty on both sides of the library/publisher copyright debate. But after 12 years of experience with the Act, librarians are

[187] For preservation filming done under contract for libraries, the library takes responsibility for obtaining whatever permission is necessary, or certifying that the material is in the public domain or that the copying is lawful under section 108 of the Copyright Act.
[188] Phone conversation with Joe Fitzsimmons, March 16, 1990.

used to the way in which it works, and they seem reasonably content with the balance struck by Section 108.[189] Similarly, the revolution in photocopying technology has stabilized, and publishers may no longer feel as threatened by basic library copying as they once did. The new threat is electronic dissemination, known as electro-copying. But even in the electronic environment, progress has been made. As commercially available full text retrieval systems have matured, publishers have routinely negotiated royalty mechanisms to compensate copyright owners for the electronic use and distribution of their works. These arrangements have demonstrated that agreement is possible, and that there can actually be more control, not less, over the distribution of a work in an electronic environment. For the print publisher, negotiation of such an agreement can provide a new income stream at no additional cost.

The difficulty with negotiating with publishers is largely one of scale. There are so many publishers that it would be difficult, if not impossible, to locate and negotiate with all of them without a staff dedicated to that activity similar in size to the one at UMI. This problem suggests the need to deal with a group of publishers, through an organization such as the American Association of Publishers (AAP) or a collective such as the Copyright Clearance Center (CCC). However, a group of publishers such as the AAP typically has no authority to bind its members. Moreover, the AAP has generally taken hard-line positions on copyright matters and may not be willing to back away from that stance even to consider preservation issues from a fresh perspective. (The CCC will be discussed, *infra*, under "collectives".) Nonetheless, it may be worthwhile to explore the issues with a representative cross-section of publishers from commercial and academic sectors and wide- and special-circulation publishers. If agreement were possible, it could not only open up the publications of those publishers to the preservation program, it could also demonstrate good faith and have precedential or persuasive value when dealing with other publishers.

B. Reliance on Fair Use: Market Value of Older Works

Although fair use is a judicially created rule of reason, it has now been incorporated into the Copyright Act. As a result, it could be modified directly through the legislative process or it could continue to grow through judicial interpretation of the statute.

Since one of the key elements of fair use is the market value of a work, it is reasonable to inquire at what point the market value is sufficiently diminished to permit a generally desirable activity such as preservation copying to go forward. One might think of this approach as being similar to investigating the half-life of a radioactive specimen. The maximum value of a work to its owner occurs, in most cases, shortly after publication. At some point, the value is diminished to only half of what it was then. At another point, it is half again, or only one quarter of its maximum value. Somewhere on this curve, there is likely to be a point at which other socially desirable uses become more acceptable than they were when the value of the work was at its peak. Where might that point be?

There are several ways to approach the question. At the outside, one might argue that the statute incorporates, or has at various times tried to incorporate, this idea by making copyright finite in duration. Thus, it might be suggested that the point occurs at the life of the author plus 50 years. Or it might be suggested that 75 years, 56 years, 28 years, or 14 years, the previous terms of copyright, best represent the concept. But as these figures have changed over time, they seem largely arbitrary, chosen for a variety of reasons, without any actual market analysis.

[189] See generally Second Report of the Register of Copyrights on Library Reproduction of Copyrighted Works (17 U.S.C. 108) at 39 *et.seq.* (January 1988).

Some recent studies suggest a more scientific approach to the issue. According to a study conducted at the American Bookseller Association convention in 1987 and reported in *Publishers Weekly*[190], most books published in the United States go out of print in about three years.[191] Presumably, the implication of this fact is that ongoing sales of the work have diminished to the point where it is no longer economically viable for the publisher to keep the work in print. Even more graphic is that when asked about the "typical" pattern of sales for a book with a 2.5-year life cycle, publishers reported that 91.14 percent of all sales occur in the first year.[192]

Similarly, public library use studies suggest that with the exception of a relatively small number of classic titles, the circulation of most new popular books diminishes each year.[193] Interlibrary loan studies are similar, with most of the requests occurring during the first few years after publication, but with a somewhat higher level of residual interest. According to a study published in 1979, about half (48.6%) of all interlibrary photocopy requests are for articles published within the last five years and 69.5% are for articles less than ten years old.[194]

Citation studies reveal similar patterns. Even in law, where precedent is vital, citation of decisions decreases substantially with time. According to a citation study done in 1976 by Posner and Landes, the median age of precedent cited by the Supreme Court was 5.4 years and by the U.S. Courts of Appeals was 4.3 years. Decisions of the U.S. Supreme Court had a much longer half-life than others at about 9.8 years, although the age of cited cases varied somewhat with the legal issue involved. The half-life of citations in scholarly journals is somewhat shorter than citations in judicial opinions. According to at least one study of the literature, the half-life appears to be about 5.5 years in economic and sociological literature and 4 years in physics.[195]

All of this suggests that the use of most works drops off significantly after about five years. Most book sales occur during the first year after publication; most uses of journal literature occur within the first five years. Even if a substantially longer period were adopted—perhaps as much as ten years—to avoid compromising the rights of the copyright owner, it would still seem reasonable then to permit certain preservation-oriented copying beyond the limits of section 108 (b) and (c) under fair use. Under Seltzer's formulation of fair use, such copying could easily be seen as being "necessary for the furtherance of knowledge, literature, and the arts" and not depriving the creator of the work of an appropriately expected economic reward.[196] Similarly, in Latman's analysis,[197] after that period of time has passed, the reasonable copyright owner has little expectation of further economic reward and would be likely to consent to limited preservation copying to keep his or her book on the shelves of libraries.

C. Amend Section 108 to Permit Expanded Preservation Copying

One way to deal with the uncertainties in the Act is to seek an amendment to Section 108 to clarify the aspects of the law that now appear to constrain preservation. Based on the issues identified in this paper, such an amendment might eliminate the requirement that the copying of published works be for replacement purposes only. It might also delete the need to check with the publisher. Finally, it might clarify that preservation copies could be distributed, at least to other libraries in like circumstances, and it might at least be silent on the formats into which the materials could be copied, thus permitting by implication copying into electronic formats.

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[190] Crowther, "Quantifying the Sales Push" April 8, 1988 *Publishers Weekly*, 15.

[191] The mean number of months a book remains in print was reported to be 43.07 but that included "classics", textbooks, and reference materials that basically never go out of print. Of the total, about 40% indicated a life expectancy of between 31.6 and 41.4 months. *Id.*

[192] *Id.*

[193] See Morse, *Library Effectiveness: A System Approach* 93 (M.I.T., 1968).

[194] Steuben, "Interlibrary Loan of Photocopies of Articles Under the New Copyright Law", 1979 *Special Libraries* 227, 230 (May/June 1979).

[195] Lovell, "The Production of Economic Literature: an Interpretation", 11 J. Econ. Lit. 27, 45 (1973). Of course these figures represent the entire body of literature in the discipline. Exceptions will occur for individual reference works and other works frequently revised and issued in new editions.

[196] Seltzer, *supra*, nt. 102.

[197] See discussion at nt. 116, *supra*.

Some years ago, Dr. Martin Cummings proposed such an amendment to the Register of Copyright:

> "The right [of] reproduction under this section applies to a copy or phonorecord of a published work duplicated in facsimile form, in the same or in a different medium, for the purpose of archival preservation."[198]

At the time, the Register rejected this idea, but urged the library community to pursue the idea with other groups, including the user, author and publishing communities "with a view to developing a common legislative position".[199] The Register was worried about the use of the phrase "in the same or in a different medium" after the reference to "facsimile form" since the more expansive clause was not used elsewhere in the Act and could be confusing. He was also worried about the potential for using such copying to create a system for "mass facsimile document storage" and "electronic transmission, and display and printout at multiple remote cites [sic]."[200] He noted that "facsimile form" was used specifically to exclude the reproduction of a work in machine-readable form.

The author of this paper suggests the following language as a basis for discussion among the communities mentioned in the Register's Report:

> (b) The rights of reproduction and distribution under this section apply to a copy or phonorecord of an unpublished work duplicated in *any medium now known or later developed* solely for the purpose of preservation *or* security, or for deposit for research use in another library or archives of the type described by clause (2) of subsection (a), if the copy or phonorecord reproduced is currently in the collection of the library or archives.
>
> (c) The rights of reproduction *and distribution* under this section apply to a copy or phonorecord of a published work duplicated in *any medium now known or later developed* solely for the purpose of replacement *or preservation* of a copy or phonorecord that is damaged, deteriorating, lost, or stolen.

This language seems to meet the goals identified above and would permit the preservation program to go forward using all available formats. It should be noted, however, that by its own terms ("a copy"), and by virtue of the fact that it would be part of Section 108, the proposed section would still limit preservation copying to single copies.

D. Collective Licensing

A license agreement can provide certainty by giving permission to copy in return for the payment of a fee. If the license covers a large number of publishers, it can also help to keep the transaction costs for individual titles to a minimum. Such a license agreement could be either a voluntary agreement between the parties or a compulsory arrangement required under law. A compulsory license would provide great certainty, but might also create a record-keeping burden. A voluntary agreement can demonstrate good faith but only binds the parties. Since some publishers might elect not to participate, the voluntary license carries potentially higher transaction costs for the negotiation of many separate agreements. A voluntary agreement would also be unlikely to solve the problem for publishers no longer in business.

1. Voluntary Licenses

Voluntary license agreements could be negotiated with individual publishers, as discussed earlier, or with a collective reproducing rights organization such as the Copyright Clearance Center (CCC).

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198 Quoted in 1983 Report of the Register of Copyrights, *supra*, nt. 3 at 337.
199 *Id.* at 340.
200 *Id.* at 338.

The Copyright Clearance Center was created after the passage of the 1976 Act as an organization to represent publishers and provide a centralized mechanism for the collection and payment of royalties. Beginning with a relatively small list of publishers and titles, the Copyright Clearance Center today represents over 6,300 publishers worldwide, covering some 1.1 million published titles.

The initial focus of the Copyright Clearance Center was on corporate users, and both collections and payments were based on individual copying transactions.[201] More recently, however, the Copyright Clearance Center has developed a program for blanket licensing in the corporate sector, and it has begun to explore the development of similar programs for academic institutions. Such programs are typically based on a sampling of actual photocopying during a specified period of time. As a result, they avoid the necessity of keeping detailed records of all copying throughout the year. A two-year pilot study now under way at Columbia University, Northeastern University, and Stanford University will collect similar information about the amount and kind of copying done on those campuses. At the conclusion of the study, a recommendation will be made for a blanket license to cover university copying. Some institutions participating in the brittle books program may come under the protection of such agreements. It is important to keep in mind, however, that the CCC cannot license all university copying; it can only license copying for those publishers that participate in their programs.[202]

No license is needed for copying permitted under the statute. However, wherever the preservation program might exceed those limits, participating institutions might find it appropriate to negotiate a license agreement with the Copyright Clearance Center, at least for those publishers which the CCC has authority to represent. Most such agreements are separately negotiated based on the type of industry (profit-making vs. non-profit), the amount of copying, etc. But as with the agreements UMI has reached, the amount of the royalties tends to be based on the demands and needs of individual publishers. As a result, it is difficult to speculate precisely about what kind of agreement might be reached. Nonetheless, it is a mechanism worth exploring since it could provide a great deal of certainty without much administrative cost.

The CCC has concentrated its work to date on traditional photocopying; it is just beginning to explore the implications of electronic dissemination. The CCC has established a task force that is looking into a program to license scanning and reproducing materials in electronic format for distribution within a corporation, much as the National Library of Medicine has begun its programs wholly inside the library. The CCC's investigations do not include, however, resale of the documents or wider distribution beyond the individual company. For now, at least, that type of electronic copying and distribution will still have to be negotiated individually with individual publishers.

2. Compulsory Licenses[203]

Compulsory licenses have been used[204] historically to provide a mechanism for compensation to creators in situations where control of copies or control over the use of a particular work

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[201] Royalty information on individual publications has been compiled by the CCC into a book known as the *Publisher's Photocopy Fee Catalog* and is also available on software. The software not only provides a list of royalties, it also provides a mechanism for storing information about items copied. The disk or a print-out can be sent to the CCC for invoicing.

[202] A list of publishers currently participating in the annual authorization service of the CCC is attached as an appendix to this report. Although the list is lengthy, many will be found missing.

[203] For a good discussion of compulsory licenses generally, and compulsory licenses for cable TV in particular, see Hyman, "The Socialization of Copyright: The Increased Use of Compulsory Licenses", 4 *Cardozo Arts & Entertainment Law Journal* 105 (1985).

[204] Compulsory licenses first came into U.S. copyright law for the reproduction of copyrighted music. Under the 1909 Copyright Act, once the copyright owner had licensed the first recording, subsequent recordings of the same musical composition could be made by paying a royalty. With a few changes, this basic scheme was carried forward into the Copyright Act of 1976 (17 U.S.C. 115). The 1976 Act also added compulsory licenses for jukeboxes (17 U.S.C. 116), public broadcasting (17 U.S.C. 118), and cable television (17 U.S.C. 111).

is difficult.[205] Many commentators have suggested that the electronic environment is exactly the type of situation where control over a work can be lost since such works can easily be copied to disk or paper or copied from one datafile to another.[206] However, it now seems that at least the first generation electronic copy can be easily controlled if the supplier is acting in good faith. The experience with full-text information retrieval systems such as DIALOG and NEXIS demonstrates that the computer itself can keep track of the use of documents and provide the necessary data to pay royalties to the copyright owner. Nonetheless, a compulsory license might be desirable for the brittle books program because it would draw in all publishers and provide the library community with maximum certainty.

Essentially, a compulsory license grants a statutory blanket permission to use a particular kind of work in a way that would otherwise violate one of the exclusive rights of the creator in return for the payment of a single fee to a central agency. The royalties thus collected form a pool of funds from which compensation is provided to creators participating in the system. In the preservation context, such a license could authorize the copying of complete protected works into facsimile or electronic formats in return for the payment of a fixed fee. Libraries would then no longer have to worry about whether or not a work was still protected; they would not have to locate the publisher and seek permission; they would not have to pay individual royalties or worry about the copyright owner who comes out of the woodwork later to make trouble.

The different compulsory licenses that now exist provide different bases for the collection of royalties and suggest different models for compensation. For cable television, rates are established as a percentage of the gross receipts of the company; for jukeboxes, an annual fee is paid for each machine; for making and distributing phonorecords, a fee for each disk is levied for each work on the disk; and for public broadcasting, fees are collected for each performance of a covered work.[207] The fees for cable television and jukebox royalties are collected by the Register of Copyrights and distributed by the Copyright Royalty Tribunal. The Copyright Royalty Tribunal also sets or reviews the rates for cable television, for phonorecords and coin-operated phonorecord players, and for non-commercial broadcasting.

3. The Foreign Experience

Several foreign countries[208] have experimented with licenses administered through organizations similar to the Copyright Clearance Center (CCC), known as Reproducing Rights Organizations (RRO's). Those RRO's meet regularly in an organization known as the International Federation of Reproduction Rights Organizations.

By and large, RRO's are not neutral third parties. They are made up either of individual publishers or of groups of publishers and/or authors.[209] Although the CCC began its work in the United States by seeking royalties primarily from the commercial sector, in many of the European countries collecting societies have begun in the educational sector. This is true, for example, in Great Britain, Australia, and Norway. Many of these collectives are voluntary organizations operated by copyright

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[205] Indeed, one of the principal conclusions of a Rand Corp. study was that "collective administration *should* be limited to instances in which infringements cannot be dealt with individually." [Emphasis added.] See Besen & Kirby, *Compensating Creators of Intellectual Property* p. vi (Rand, 1989).

[206] See generally Office of Technology Assessment, *Intellectual Property Rights in an Age of Electronics and Information* (1986).

[207] See generally 37 C.F.R. Sec. 303 to 308 (July 1987).

[208] At least 15 jurisdictions have Reproducing Rights Organizations. They include: Great Britain (Copyright Licensing Agency), Australia (The Copyright Agency Ltd.), Canada (CanCopy), Quebec (Union des Ecrivains Quebecois), Norway (Kopinor), Austria (Musikedition), the Federal Republic of Germany (VG Wort), Austria (Literar-Mechana), Denmark (Copy-Dan), Finland (Kopiosto), France (Centre Francais du Copyright), Spain (Centre Reprograficos), Iceland (Fjolis), the Netherlands (Stichting Reprorecht), South Africa (Dramatic Artistic and Literary Rights Organization), Sweden (Bonus), and Switzerland (Pro Litteris-Teledrama). See generally 1988 Report of the Register of Copyrights 87 *et.seq.* (1988). See also 1 *Rights* 12 (Spring 1987) and Besen and Kirby, *Compensating Creators of Intellectual Property: Collectives that Collect* 45 *et. seq.* (Rand 1989).

[209] Although in United States the CCC is made up of individual publishers, in Great Britain the Copyright Licensing Agency (CLA) is composed of organizations representing publishers. In Germany authors and publishers can be individual members of the organization while in Norway authors and publishers are represented by their respective organizations.

owners to simplify the negotiation of license agreements and to provide a convenient mechanism for the collection of royalties. Some, such as the CCC, and the CLA in Great Britain, were created in response to a legislative or study commission suggestion. Others, such as those in the Nordic countries, operate under a statute providing for a system of collective license agreements.[210]

The mechanisms established by each organization for the collection and payment of royalties differ from one country to another, although in most cases, the basis of the charge is per page copied, rather than an annual blanket license. The Copyright Clearance Center has tried several different approaches, but in each of them the individual publisher determines its own per page rate of compensation. By contrast, in many other countries there is an agreed-upon fixed rate for all publishers.[211] In Finland, licenses provide for a lump sum, rather than a per page, payment. In most cases, distribution of royalties is based on a sampling of actual copies made. Some organizations, such as the CCC, have tried to base payments on actual copies, but the record-keeping burden is high and sampling techniques have been found to be less problematic.

4. Oversight of Collectives

The downside of collectives is that they inevitably gain substantial economic power over information users. As a result, most countries have found it desirable to have some form of oversight. Such oversight provides a means of controlling the potential monopolistic power of the organization as well as a means of resolving disputes about the amount of royalties or the types of licensing arrangements that can be negotiated.

France[212] now requires authors' societies to notify the Minister of Culture of proposed changes in rules for the collection and distribution of royalties. In addition, a levy on blank tapes is set by a broad-based committee that includes consumers. In Switzerland, an organization seeking to collect copyright royalties must submit an application to the Federal Department of Justice and Police. Thereafter, a subdivision of the department, known as the Bureau of Intellectual Property, supervises the activities of the society and an Arbitral Commission oversees and approves the rate structure. Germany licenses collecting societies under the German Patent Office. Collecting societies and users' organizations negotiate and enter into contracts with each other subject to arbitration if there is a dispute about the reasonableness of the fees or the willingness of another party to negotiate. A new law in Great Britain has created an expanded copyright tribunal that has jurisdiction over licensing disputes. With regard to photocopying licenses, the tribunal is specifically instructed to consider three factors: (a) to what extent published editions of the work are available; (b) the use to which photocopies will be put; and (c) the proportion of the work that will be photocopied under the license.[213] In the United States, the Copyright Royalty Tribunal administers some royalties (cable TV, record production, and jukeboxes) and has the power to take action when the parties cannot agree.

5. Collective Administration for Preservation Copying

Some form of collective agreement for the payment of copyright royalties can give the library community protection against future litigation. A voluntary agreement negotiated with the Copyright Clearance Center (CCC) should provide protection from at least those publishers for whom the CCC is authorized to act. Such an agreement would require no legislative action and could proceed immediately. The role of the CCC could be strengthened, however, if it was given more explicit

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[210] See Karnell, "Extended Collective License Clauses and Agreements in Nordic Copyright Law", 10 *Columbia-VLA Journal of Law & the Arts* 73 (1985).

[211] In Britain, the fee is 1.1p per page; in Germany, it is DM 0.05 per page from a school book and DM 0.02 per page for all other copying; in France it is 10 centimes per page; in Switzerland, the price is 6 Swiss centimes per page, and in the Netherlands the fee is 0.025 guilder per page for scientific publications and 0.10 guilder per page for other publications. In most of the Scandinavian countries except Finland pricing is also on a per page basis.

[212] The information on oversight is drawn largely from Besen and Kirby, *supra* nt. 209.

[213] Laws of Great Britain, 1988 Current Law States Annotated c.48, Sec. 130 (Sweet & Maxwell 1989).

statutory authority to act on behalf of a group of publishers much as is done for the music industry. Going further, a compulsory license for preservation copying would give libraries blanket permission to go forward with designated activities subject to the payment of a statutory royalty fee to the appropriate tribunal.

A first try at a compulsory license section might be provided by using different sections of the current Act as models:

PROPOSED Section 119. Compulsory license for the preservation of deteriorating works.

In the case of literary works, musical works, dramatic works, pantomimes and choreographic works, pictorial or graphic works, motion pictures and other audio-visual works, reproduced on a deteriorating medium,[214] such as paper or film, the exclusive rights provided by clauses (1), (3), and (5) of section 106, to make, distribute, and display publicly such works, are subject to compulsory licensing under the conditions specified by this section.

(a) Availability and Scope of Compulsory License.

(1) Any library or archive meeting the requirements of Section 108(a) which is the lawful owner of a published or unpublished literary work, musical work, dramatic work, pantomime or choreographic work, pictorial or graphic work, motion picture, or other audio-visual work reproduced on a deteriorating medium and fixed on that medium more than ten years previously, may obtain a compulsory license for the reproduction of the work in any format and for the distribution and display of that work to other libraries and to individual users, provided that the library has no notice that the copy would be used for any purpose other than private study, scholarship or research.

(2) The compulsory license obtained by a library includes the privilege of making and distributing a copy of the work in any form or displaying the work publicly, but it does not include the making of derivative products or permitting a general right of resale other than as provided above. Such copies will not themselves be granted protection as a derivative work or a compilation, except with the express consent of the copyright owner.

(3) The library may obtain a compulsory license by filing the application with the Register of Copyrights and paying the royalties provided by subsection (b).

(b) Royalty Payable Under Compulsory License.—

(1) The royalty under a compulsory license shall be payable for every copy made and distributed in accordance with the license, but not for copies merely displayed at another library or displayed to an individual user for private study, scholarship, or research. For this purpose, a copy is considered "distributed" when a subsequent copy is made in any tangible form, whether copied to paper, downloaded to computer disk, or transferred to any other medium from which it can be perceived, either directly or with the aid of a machine or device.

(2) With respect to each work copied and distributed, the royalty shall be 0.1 cents per page.

(3) A library that has obtained a compulsory license and made and distributed copies thereunder shall, on an annual basis, deposit a statement of account with the Register of Copyright, in accordance with requirements that the Register shall, after consultation with the Copyright Royalty Tribunal, prescribe. That statement of account shall cover the

[214] Legislative history should provide illustrations of deteriorating media but should be sure to state that they are non-exclusive.

12 months next preceding, and shall specify the number of copies made and distributed and such other data as the Register of Copyrights may, after consultation with the Copyright Royalty Tribunal, require. The regulations covering the annual statement of account shall prescribe the form, content, and manner of certification with respect to the number of copies made and distributed.

(c) Distribution of Royalties.—

(1) To be entitled to receive royalties under a compulsory license, the copyright owner must be identified in the registration or other public records of the Copyright Office. The owner is entitled to royalties for copies made and distributed after being so identified, but is not entitled to recover for any copy previously made and distributed.

(2) The Register of Copyright shall receive all fees deposited under this section and, after deducting the reasonable costs incurred by the Copyright Office under this section, shall deposit the balance in the Treasury of the United States, in such manner as the Secretary of the Treasury directs. All funds held by the Secretary of the Treasury shall be invested in interest-bearing United States securities for later distribution with interest by the Copyright Royalty Tribunal as provided by this title. The Register shall submit to the Copyright Royalty Tribunal on an annual basis, a detailed statement of account covering all fees received for the relevant period provided by subsection (c) (3).

(3) During the month of January in each year, every person claiming to be entitled to compulsory license fees under this section for copies made and distributed during the preceding twelve-month period shall file a claim with the Copyright Royalty Tribunal, in accordance with requirements that the Tribunal shall prescribe by regulation. Such claim shall include an agreement to accept as final, except as provided in section 810 of this title, the determination of the Copyright Royalty Tribunal in any controversy concerning the distribution of royalty fees deposited under this section to which the claimant is a party. Notwithstanding any provisions of the antitrust laws, for purposes of this subsection any claimants may agree among themselves as to the proportionate division of compulsory licensing fees among them, may lump their claims together and file them jointly or as a single claim, or may designate a common agent to receive payment on their behalf.

(4) After the first day of July of each year, the Copyright Royalty Tribunal shall determine whether there exists a controversy concerning the distribution of royalty fees deposited under this section. If the Tribunal determines that no such controversy exists, it shall, after deducting its reasonable administrative costs under this section, distribute such fees to the copyright owners entitled, or to their designated agents. If it finds that such a controversy exists, it shall, pursuant to chapter 8 of this title, conduct a proceeding to determine the distribution of royalty fees.

(5) The fees to be distributed shall be divided as follows:

(A) to every copyright owner not affiliated with a reproducing rights organization, the pro rata share of the fees to be distributed to which such copyright owner proves entitlement.

(B) to the reproducing rights organizations, the remainder of the fees to be distributed in such pro rata shares as they shall by agreement stipulate among themselves, or, if they fail to agree, the pro rata share to which such organizations prove entitlement.

(C) during the pendency of any proceeding under this section, the Copyright Royalty Tribunal shall withhold from distribution an amount sufficient to satisfy all claims with respect to which a controversy exists, but shall have discretion to proceed to distribute any amounts that are not in controversy.

(6) The Copyright Royalty Tribunal shall promulgate regulations under which persons who can reasonably be expected to have claims may, without expense to or harassment of the libraries, obtain such information with respect to copies made and distributed as may be reasonably necessary to determine, by sampling procedures or otherwise, the proportion of copying from the works of different copyright owners. Any person who alleges that he or she has been denied the access permitted under the regulations prescribed by the Copyright Royalty Tribunal may bring an action in the United States District Court for the District of Columbia for the cancellation of the compulsory license and the court shall have the power to declare the compulsory license thereof invalid from the date of issue thereof.

(d) Definition.—

For purposes of this section a "reproducing rights organization" is an association or corporation that licenses the making of copies on behalf of copyright owners such as the Copyright Clearance Center.

A few comments on this proposal seem necessary. First, it should be noted that under this proposal, the royalty is to be paid on *all* copies made and distributed under the license, not just those still under copyright. The purpose of this suggestion is for ease of administration and to make it unnecessary to make a determination about copyright status each time a work is distributed. This could have come out another way, but the burden of making copyright determinations for each transaction would be significant. Although such a change would reduce the number of royalty payments, the amount per page would then have to be higher to generate an appropriate amount of revenue for subsequent claimants.

The suggestion of 0.1 cents per page as a royalty payment is wholly arbitrary. It is suggested based on the royalties noted above for foreign jurisdictions which amount to an average of about 2 cents per page[215] for protected works. The lower amount paid on all copies seems reasonable, to generate a similar amount of revenue.

Like the existing law, this proposal strikes a middle ground between compulsory and voluntary licensing. The compulsory license is created, but administration of royalties is largely left to one or more voluntary organizations like the Copyright Clearance Center.

E. Set Up Internal Royalty Payment Fund

The reaction of some librarians to the proposals for a statutory amendment, such as the amendment to Section 108 or the creation of a compulsory license, has been negative. They are aware of the difficulty there would be in carrying such a proposal through Congress. It has been suggested, for example, that any such proposal would have to come to Congress with the joint support of both the publishing and library communities. While such a bipartisan approach is a possibility, the past history of copyright negotiations suggests that agreement will not be easy. Moreover, there is also a sense it may still be too soon to reopen the copyright discussion, that doing so will simply reopen the wounds from the copyright revision battles of the 1970's. Thus, there is significant appeal to the idea of finding a means to allow the preservation program to go forward without a statutory change.

[215] See nt. 211, *supra*.

Without any statutory amendment, cooperating libraries could follow some of the ideas set out above. They could, for example, negotiate with publishers where possible, but in any event, assess themselves a specific amount of money to set aside for the potential payment of royalties. Again, the amount of money is likely to be somewhat arbitrary, but the ultimate goal would be to create a pool of funds from which the libraries could pay any legitimate claimants the royalties to which they are due. The fund should be large enough to cover attorney's fees and any litigation expenses that might also be necessary. The actual amount set aside might be 1 cent per page or a dollar per volume, indexed to inflation, and it might vary with the activity—more for copies distributed, less for making the preservation master.

It must be stressed that this idea is not the equivalent of the compulsory license without the statute. Most importantly, unlike both statutory amendments suggested here, it would give libraries no greater rights than already exist under the statute. Both proposed amendments have tried to legalize the conversion of materials into electronic formats. That idea would not be accommodated by this proposal. Moreover, the compulsory license proposal accommodates newer materials by allowing a limited copying and distribution privilege for materials at least ten years old. Without a statutory amendment, such copying would continue to be problematic.

This proposal to create a royalty payment fund would create some level of financial security by establishing a pool of funds that could be used to pay legitimate claimants and hire legal counsel should that become necessary. However, it will also increase the transaction costs since there will be a need to negotiate with individual claimants and make decisions about how much compensation they should be given for the use of their work. In the end, of course, if the claimants are not satisfied, they could still bring legal action. Thus, although this route may seem easier at the outset because it avoids the necessity of seeking a Congressional amendment, in the long run it may actually create more problems and take more time.

F. Create Quasi-Governmental Corporation

In addition to the foregoing ideas, consideration should also be given to creating a quasi-governmental corporation that would provide a financial base for the preservation infrastructure and would create a permanent organization for carrying out the preservation agenda. Such an organization could be modeled on the Corporation for Public Broadcasting and could operate in the public interest.

There was a discussion about a similar organization for the ill-fated National Periodicals Center (NCP) in 1979. Interestingly, the goal of that earlier effort was similar to the long-term goal of the Commission. The goal of the NPC, as articulated in the draft bill, was:

> to serve as a national periodical resource by contributing to the preservation of periodical materials and by providing access to a comprehensive collection of periodical literature to public and private libraries throughout the United States.[216]

The Commission has stated its "ultimate vision" as:

> the existence of a collective knowledge base, in digitized format, from which individual institutions and individual scholars can obtain a variety of formats to serve their scholarly objectives and programs. Initially, this "national collection" could take the form of a centralized depository of microfilms with access through on-line bibliographic services and efficient twenty-four hour delivery mechanisms with the expectation that storage, access, and service enhancements will evolve with the increasing use of technology by scholars and expanded availability of network capabilities to the research community.[217]

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[216] Discussion draft of S.B. 1839, Sec. 241, "Purpose", 41.
[217] "Commission on Preservation and Access" [3], mimeo (January 1988).

The 1979 draft bill would have authorized the creation of a Corporation and established its governance structure. It was to be a tax-exempt corporation with a director and a 15-person Board. Its base budget from federal appropriations was to be set at $750,000, but it would have had the authority to obtain grants and make contracts with individuals and with private, state and federal agencies, organizations and institutions.

Unfortunately, the National Periodicals Center foundered largely because of a fear from the publishing industry that it would become a large central library on which other libraries would rely, causing the cancellation of large numbers of subscriptions to current periodical literature. In that sense, while the proposal for the NPC was a good one, it failed to deal with the legitimate concerns of publishers and the need to provide an adequate mechanism to assure the payment of appropriate royalties. There was language in the bill that suggested the Corporation should take these concerns into account but no mechanism was created for doing so. It may be that a quasi-governmental corporation focused on the preservation of *non-current* materials with a clear mechanism for the payment of royalties similar to that proposed under the compulsory license section, *supra*, would have a better chance of success.

The success of a proposal such as this will depend on it having support from both the library and the publishing communities. The publishing community may be receptive to the idea if it (1) does not undermine the current subscription base, and (2) creates a clear mechanism for the payment of appropriate royalties.

VI. LEGISLATIVE OR OTHER FOLLOW UP-ACTION

A. Decisions to be Made

At several points during this paper, the issue under discussion could be resolved in different ways depending on the goals of the preservation program. For example, if limited to the making of facsimile copies (*i.e.*, microform copies) of old, out-of-print, deteriorated material for preservation purposes only, the program will follow one course and the statutory obstacles will be relatively low. If, on the other hand, the goal is to build an online datafile of current material for distribution to libraries and individual users worldwide there will be another set of considerations and the barriers will be significant.

If the goals are indeed broader, then some mechanism must be in place either to negotiate with publishers individually or to provide for collective administration of royalties. This may require a statutory change. If, on the other hand, the focus is more limited, it may be possible to proceed without a statutory change on those materials that are now in the public domain. As a middle ground, participating libraries may wish to proceed on materials not yet in the public domain, but also not current (*e.g.*, older than ten years) and may, therefore, wish to seek to have the limitation to "facsimile form" removed. Again, this will require either a statutory change or negotiation with individual copyright owners.

The library community also needs to decide about questions of access. Will access to publications be available only to libraries? Only to libraries that already held the title and now find it deteriorating? What about libraries that never held the title but now wish to add it to their collections? What about individual scholars and researchers? The answers to these questions will help to focus the discussion about what should be done next. The more closely the answers are related to goals that are already accepted by the Act—*i.e.*, preservation, not general distribution—the easier it will be to proceed without a statutory amendment. The broader the goal becomes, the more necessary it will be either to compensate copyright owners or to seek a statutory amendment.

B. Discussion and Agreement among Library Groups

Once there is a clear decision about these matters in the preservation community, a discussion should be initiated with other library groups, directed at gaining a consensus about the priority need for a solution to the copyright issues involved in the preservation program. Any changes to the Copyright Act are likely to be difficult to achieve since there are so many players that have a vested interest in the status quo. The library community will need to have a clear view of what is needed and a unified approach to the issue as they enter subsequent discussions with the publishing industry and with members of Congress.

C. Discussion with the Publishing Community

It is clear from the quotation that opened this paper that progress before Congress is unlikely unless the library community and the publishing community are able to reach agreement on the importance of the problem and the appropriateness of the changes to the Act that might be suggested. The Copyright Office is not willing to formulate the solution but it is looking to the interested parties to take the lead to propose solutions for review and possible endorsement. Similarly, several individuals have commented that Congress will not do anything in this area that turns out to be contentious. Regrettably, the library associations also seem to shy away from major proposals, probably because it has taken so long to recover from the battles of the copyright revision effort of the 1970's. Few seem willing to reopen the old questions, preferring instead to live with the equilibrium that now seems to exist, even if it leaves some unanswered questions.

Preservation, however, is an issue that has widespread support, and which might be a good vehicle for exploring a limited sphere of copyright issues. It would probably be useful, therefore, for a preservation-oriented leadership group to follow the approach taken by the National Library of Medicine and convene a small working group of librarians/preservationists and publishers' representatives to discuss the issues and possible solutions. If it is possible through those discussions to come up with some agreement then either the agreement itself might make a statutory change unnecessary or it could lead to a joint legislative proposal.

D. Discussion with Congressional Staff and the Copyright Office

Finally, at an early stage, the issues involved here should be discussed with staff members of the relevant Congressional Committees and with members of the Copyright Office staff. Support from those two areas will be critical as any proposed legislation proceeds. Moreover, they are in the best position to give advice on how they see the issues, what are the competing considerations, and who should be involved in any further discussions that might take place before a bill is introduced.

APPENDIX

Copyright Clearance Center
Publisher List

Note: All Norwegian, Spanish & New Zealand publishers participate in the AAS

A A Balkema
A A Publishing Division
A A T Publishing, Inc.
A B P Investments (Australia) Pty. Ltd.
A & C Black (Publishers), Ltd.
A C Croft, Inc.
A D A C Verlag GmbH
A Francke Verlag GmbH
A G B Westbourne, Ltd.
A H Stockwell, Ltd.
A I Week Inc.
A J Burke Books
A Jour
A K S ev
A L K I M Communication Production Co.
AMACOM
A L S-Verlag GmbH
A O L-Verlag
A Pedone
A Q-Verlag
A S H R A E, Inc.
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